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# IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

Jeremiah W. (Jay) Nixon, Attorney General of Missouri, and John Maupin, Chairman, Missouri Ethics Commission, *Petitioners*,

v.

Thomas D. Carver, *Respondent*.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

## PETITION FOR WRIT OF CERTIORARI

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## QUESTION PRESENTED

In the 1994 general election, the voters of Missouri overwhelmingly approved an initiative to impose graduated limits on campaign contributions, based on the size of the constituency served by the particular political office. The purpose of these limits was to eliminate as much as possible the perception that significant contributors to political campaigns were obtaining undue influence with elected officials of the State. The question presented by this suit, a challenge to the constitutionality of those limits, is:

Whether the First Amendment prohibits a State from adopting campaign contribution limits for state and local offices that are substantially lower than the $1,000 limit approved by this Court in *Buckley v. Valeo*, 424 U.S. 1 (1976), for presidential and congressional elections.

## PARTIES TO THE PROCEEDING

The parties in this suit are Jeremiah W. (Jay) Nixon, Attorney General of Missouri; John Maupin, Chair of the Missouri Ethics Commission; and Thomas D. Carver.

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**IN THE SUPREME COURT OF THE UNITED STATES**

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JEREMIAH W. (JAY) NIXON,
Attorney General of Missouri,
and JOHN MAUPIN, Chairman, Missouri Ethics Commission, *Petitioners*,

v.

THOMAS D. CARVER, *Respondent*.

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# PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Jeremiah W. (Jay) Nixon, Attorney General of Missouri, and John Maupin, Chairman of the Missouri Ethics Commission, respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case.

## OPINIONS BELOW

The opinion of the court of appeals (Appendix ("App.") at A-1 - A-20) will be reported at 72 F.3d 633. The opinion of the district court (App. at A-30 - A-42) is reported at 882 F. Supp. 901.

## JURISDICTION

The court of appeals entered its judgment on December 19, 1995. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

*Constitution of the United States. Amendment I:*

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

*Section 130.100. Revised Statutes of Missouri:*

Contribution Limits: There shall be the following limitations on campaign contributions:

(1) No person or committee shall make a contribution to any one candidate or candidate committee with an aggregate value in excess of:

(a) $100 per election cycle per candidate in districts with fewer than 100,000 residents;

(2) [b] $200 per election cycle per candidate, other than statewide candidates, in districts of 100,000 or more residents. For purposes of this section, "statewide candidates" refers to those candidates seeking election to the office of Governor, Lieutenant Governor, Attorney General, Auditor, Treasurer, and Secretary of State.

(3) [c] $300 per election cycle per statewide candidate.

(2) No person, entity or committee shall make a contribution to any other persons, entities or committees for the purpose of contributing to a specific candidate which when added together or when added together with contributions made directly to the candidate or to the candidate's committee, will have an aggregate value in excess of the limits stated in [sub]section 1.

(3) No candidate or candidate committee shall solicit or accept any contribution with an aggregate value in excess of the limits stated in this section.

(4) For purposes of this section, the term "candidate" shall include the candidate, the candidate's treasurer, and the candidate's committee and any contribution to the candidate's treasurer or candidate committee shall be deemed a contribution to the candidate.

## STATEMENT

Since at least 1907, legislatures have repeatedly tried to prevent government officials and candidates for office from accepting money from those with financial interests in official action.[1] For many years, those efforts were limited to restricting contributions from corporations, labor unions, and government employees to candidates.[2] The inadequacy of those efforts was dramatically demonstrated by incidents such as the "milk fund" scandals and other equally serious abuses arising out of the 1972 presidential elections. Congress and many state legislatures reacted by enacting

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[1] *See United States v. Auto Workers*, 352 U.S. 567, 575 (1957).

[2] *See id.* at 575-587.

broader reforms, such as federal disclosure requirements and contribution limits.

Those laws may have reduced, but they did not eliminate the public's perception that corruption results from giving money to those seeking or occupying public office. The increasing public disillusionment that was evident as the 1990's began has turned into a new wave of reform efforts. In the November 1994 general election, Missouri voters responded to that disillusionment and to the profound harm to the political process that public cynicism creates. By a vote of 74%, the citizens of Missouri enacted Proposition A, including § 130.100,[3] which is at issue here. Section 130.100 imposed for the first time limits on contributions made directly to candidates for Missouri state and local offices.[4] Where the statute challenged in *Buckley v. Valeo*[5] imposed a single, $1,000 limit in all federal campaigns, § 130.100 set limits ranging from $100 to $300, according to the size of the constituency of the office being sought.

On December 13, 1994, respondent Carver filed this suit challenging the constitutionality of the new Missouri limits. Carver, who has in the past made contributions in

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[3] § 130.100, Rev. Stat. Mo. (Supp 1995); *see* pages 1-2, *supra*.

[4] Anticipating Proposition A, the 1994 Missouri General Assembly enacted a higher set of contribution limits, § 130.032, effective January 1995. The more restrictive limits in § 130.100 preempted the § 130.032 limits.

[5] 424 U.S. 1 (1976).

excess of the new limits,[6] named two state officials as defendants: Attorney General Jeremiah W. (Jay) Nixon and John Maupin, Chair of the Missouri Ethics Commission. Carver first obtained a temporary restraining order, then a preliminary injunction, each preventing enforcement of § 130.100.

Before ruling on permanent relief, the court held an evidentiary hearing. Carver testified as to his past contributions and future plans, and concerning independent expenditures that he had observed in ongoing elections in Springfield, Missouri, where the hearing was held.[7] His two expert witnesses, both professional campaign consultants, testified principally concerning the use and cost of television advertising by candidates.[8]

The defendants responded with testimony from voters and from their own experts. One expert testified about his studies of contribution limits, including research regarding the limits imposed by many cities in California, which include some limits lower than those imposed in Missouri.[9] Both experts provided anecdotal evidence regarding federal and state campaigns, including some in which the successful candidates voluntarily limited

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[6] Transcript of March 31, 1995, evidentiary hearing ("Tr.") at 6-7.

[7] Tr. at 4-15, 21-28.

[8] Tr. at 30-102.

[9] Tr. at 118-133.

contributions to amounts as low as $100,[10] similar to campaigns mentioned in *Buckley*.[11]

On April 18, 1995, the district court issued an order and judgment upholding § 130.100 as constitutional and denying Carver's request for a permanent injunction.[12] The district court found that Missouri's compelling interest in preventing the perception of corruption was served by limiting campaign contributions.[13] The court held that § 130.100, with its range of limits set according to the size of the constituency, was narrowly tailored to meet the state's goals.[14] Like this Court in *Buckley*, the district court found no significant interference with respondent Carver's ability to continue associating with the political candidates of his choice.

After the district court denied Carver's post-trial motion, he sought review in the United States Court of Appeals for the Eighth Circuit. On December 19, 1995, the court of appeals reversed the decision of the district court and ordered that court to enter an injunction against enforcement of § 130.100.[15]

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[10] Tr. at 125-33, 166-75.

[11] 424 U.S. at 21 n. 23.

[12] App. A-30 - A-42.

[13] App. A-35.

[14] App. A-37 - A-39.

[15] Both the court of appeals and Justice Thomas of this Court denied applications for stay of issuance of the mandate.

## REASONS FOR GRANTING THE WRIT

### I. The decision of the Eighth Circuit marks a critical moment in post-*Buckley* jurisprudence – a point at which this Court should again give direction for future campaign finance reform rather than leaving that decision to play an important role in the ongoing political debate over those reform efforts.

As reviewed in *United States v. C.I.O.*,[16] our nation has a 90-year history of attacking corruption and its appearance by restricting payments to elected officers.[17] The constitutionality of that approach to fighting corruption was repeatedly questioned.[18] But until twenty years ago this Court did not directly address the legal issue. The Court's unwillingness to accept the First Amendment arguments made in those earlier cases by the parties[19] or by dissenting justices[20] implicitly endorsed the use of

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[16] 335 U.S. 106 (1948).

[17] *See United States v. C.I.O.*, 335 U.S. 106, 113-15 (1948); *United States v. Auto Workers*, 352 U.S. 567, 575 (1957).

[18] *United States v. C.I.O.*, 335 U.S. at 114; *United States v. Auto Workers*, 352 U.S. at 576, 588; *Pipefitters Local Union No. 562 v. United States*, 407 U.S. 385, 402-09 (1972).

[19] *E.g.*, *Pipefitters*, 407 U.S. at 402-09.

[20] *E.g.*, *United States v. Auto Workers*, 352 U.S. at 593-98 (Douglas, J. dissenting).

restrictions on payments to candidates as a means of alleviating the perception that public officials had sold influence to wealthy contributors under the guise of receiving campaign contributions.

This Court has reached the question of the constitutionality of restrictions on campaign contributions made by individuals directly to candidates only once, in *Buckley v. Valeo*. The Court's analysis there of the precise constitutional issue posed by limits on campaign contributions was a sufficient first step. By upholding a $1,000 limit, the Court provided states with a safe harbor for adopting a similar limit. The problem with the Court's skeletal approach is that is does not provide any clear way to evaluate contribution limits that are lower than those approved by the Court. Thus, as states and cities have become inclined to further restrict the amount of money that each individual can contribute to campaigns for offices involving fewer constituents, the need for some clearer guidance arises.

Rather than give specific guidance, in *Buckley* this Court declined to apply undue judicial scrutiny to how Congress had responded to the problem of the public's perception of corruption.[21] While the FECA limits remained unchanged, while states adopted limits largely in line with the FECA limits, while inflation did not unduly diminish the value of the $1,000 contribution allowed in presidential and other federal races, and while the requirement for legislative deference remained in place, the absence of concrete guidance was not an important concern.

For the judiciary, this need for guidance has now become critical. The decisions in this case demonstrate that

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[21] *See* 424 U.S. at 30.

the lower courts need to know precisely what First Amendment rights of contributors are implicated and how contributors' claims are to be evaluated by the courts. The U.S. District Court for the District of Columbia already faces that question.[22] It will continue to arise,[23] forcing the lower courts to divine from the language and holding in *Buckley* whether the door through which money is handed to politicians can ever be closed far enough to prevent payments of something less than $1,000 per election.

The need for clarification is perhaps even more critical in the political arena. As discussed in part II below, changing contribution limits has become a national political issue. The Eighth Circuit has created a powerful new tool for opponents of lower limits: an endorsement of the cries that although no one is to be prevented from speaking out in favor of electing their preferred candidate, someone's constitutional rights will be infringed merely because they are no longer able to hand over large amounts of money to the candidates themselves. By ducking behind the Eighth Circuit's definition of contributors' constitutional rights, legislators facing votes on imposing lower contribution limits will be able to avoid the criticisms that they are protecting their own purses.

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[22] *See National Black Police Ass'n v. District of Columbia Board of Elections and Ethics*, 858 F. Supp. 257 (1994). The D.C. case is scheduled for trial in February 1996. A comparable Oregon law (*see* p. 12, *infra*) is also being challenged, but in state court and on the basis of that state's more restrictive version of the First Amendment.

[23] *See* pp. 11-12, *infra*, for discussion of other states and municipalities that have adopted limits lower than those established in the FECA.

This case demands attention much like the movements that led to the initiatives reviewed by this Court in *Romer*[24] and *Thornton*.[25] Each was part of a widespread, grassroots fight for something that much of the public (although apparently less than a majority of legislators) deemed to be a critical need. Just as the Court decided to hear those cases without waiting for a conflict to emerge among the lower courts, it should intervene here to ensure that the political debate is properly framed in terms of the policy preferences of the electorate or its representatives, and not in terms of the constitutional propriety of the particular restriction on campaign contributions. So long as the constitutional validity of any restriction below that sustained in *Buckley* remains in question, the political process will suffer a needless and harmful distraction that only this Court can dispel.

## II. Missouri's law exemplifies the kind of limits being debated throughout the United States.

Since it decided *Buckley v. Valeo* nearly 20 years ago, this Court has not returned to the issue of the extent to which the states may go beyond the $1,000 FECA limit in their efforts to eliminate the perception of corruption that arises when individuals give hundreds of dollars to candidates for office to spend as they wish. The Court has approached the edges of that question more than once while dealing with a variety of issues, such as restrictions on

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[24] *Romer v. Evans*, 882 P.2d 1335 (Colo. 1994), *cert. granted*, 115 S. Ct. 1094 (February 21, 1995) (No. 94-1039).

[25] *U.S. Term Limits, Inc. v. Thornton*, 115 S. Ct. 1842 (1995).

corporate spending to oppose ballot initiatives.[26] But as to contributions to candidates, *Buckley* still stands alone. In the wake of the Eighth Circuit decision, the ambiguities and uncertainties *Buckley* leaves will distort the political movements and elections of the 1990's.

Relying on *Buckley*, many states and local governments in the 1970's and 1980's followed the lead of Congress in the FECA and adopted their own contribution limits. Some adopted the same $1,000 limit that Congress had chosen. Others set limits that far exceeded the FECA amounts. And some states, including Missouri, enacted disclosure statutes, but did not immediately follow the congressional lead in imposing contribution limits.

The wave of campaign finance reform that we see in the 1990's includes stricter disclosure requirements and new efforts at restricting expenditures.[27] It also includes a nationwide push to impose new, or in some cases reduced, limits on contributions made directly to candidates. Missouri's new law is just one result of that push. Two other states already have limits comparable to those that the Eighth Circuit invalidated: Montana and Oregon now

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[26] Most recently, this Court granted the petition for writ of certiorari in *Colorado Republican Federal Campaign Committee v. FEC*, No. 95-489 (cert. granted Jan. 8, 1996), a case involving expenditures by political parties.

[27] *See, e.g., Shrink Missouri Government PAC* v. *Maupin*, 71 F.3d 1422 (1995); *Day v. Holahan*, 34 F.3d 1356 (8th Cir. 1994).

preclude some contributions as low as $200.[28] The District of Columbia has gone further, imposing some limits as low as $50.[29] Others have adopted comparable limits for some campaigns, such as a $250 limit in some Arizona campaigns,[30] and a $500 limit in Washington.[31] The legislatures in eight other states have also adopted limits that are lower than the $1,000 limit upheld in *Buckley*, although higher than the limits in § 130.100.[32]

The restrictions in Missouri, Montana, Oregon, D.C., Arizona, and Washington have a common origin: the people, frustrated by the unwillingness of incumbent politicians to restrict their own ability to harvest funds from moneyed interests, enacted those limits by initiative. They were often passed by overwhelming majorities, such as 63%

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[28] Mont. Code. Ann. § 13-37-216 (Supp. 1995); 1995 Ore. Laws 1, 3.

[29] D.C. Code § 1-1441.1.

[30] Ariz. Rev. Stat. Ann. § 16-905A (1995).

[31] Wash. Rev. Code § 42-17-640 (1995).

[32] Conn. Gen. Stat. § 9-333m (1995) ($250); Del. Code. Ann. 15 § 8010 (1995) ($600); Fla. Stat. Ann. § 106.08 (West 1995) ($500); Kan. Stat. Ann. § 25-4153 (1994) ($500); Mass. Gen. Laws Ann. 55 § 7A (West 1995) ($500); Mich. Comp. Laws Ann. § 169.252 (West 1995) ($100); Wis. Stat. Ann. § 11.26 (West 1995) ($250). Kentucky's $100 limit, Ky. Rev. Stat. Ann. § 121.150 (1995), was held invalid on equal protection grounds not applicable here. *See Wilkinson v. Jones*, 876 F.Supp. 916 (W.D. Ky. 1995).

in Montana, 72% in Oregon, 73% in the District of Columbia, and 74% in Missouri.[33]

Initiative efforts have not been uniformly successful. In the face of a well-financed campaign reportedly sponsored by such powerful, self-interested parties as the Denver Chamber of Commerce, the Realtors, and the Tobacco Institute, an initiative was defeated in Colorado.[34] The citizens fighting for lower Colorado contribution limits have not given up. But the Eighth Circuit's decision adds a new arrow to their opponents' quiver in the battle against this year's version of that initiative. The Eighth Circuit decision will also be used to attack initiative drives now underway in Alaska (for a $500 limit applicable to all campaigns),[35] Arkansas ($100), California (two different initiative efforts, each setting some limits as low as $100), and Maine (for limits as low as $250).

The need to use the initiative process is shown by the failure of legislative efforts, such as the attempt to impose a $250 limit in Connecticut and a $500 limit for some North Carolina candidates.[36] And at the federal level,

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[33] $100 LIMIT INITIATIVE CAMPAIGNS: 1992/1994, Center for a New Democracy (1995)

[34] *Id.*

[35] Legislation has also been introduced in Alaska that is substantially similar to the initiative proposal.

[36] Ronald D. Michaelson, 1995 CAMPAIGN FINANCE UPDATE: LEGISLATION AND LITIGATION IN THE 50 STATES, THE DISTRICT OF COLUMBIA AND THE FEDERAL GOVERNMENT, Council of Governmental Ethics Laws (1995).

although six bills lowering the FECA limit were introduced in the 103d Congress and two have been introduced in the 104th,[37] none of those has passed. Such bills will continue to be introduced in Congress, and bills and petitions will be pursued in the states -- and their opponents will point to the Eighth Circuit decision as a compelling argument against passage.

That argument will be made in cities as well as in states and in Congress. Many cities have adopted their own contribution limits comparable to those in § 130.100. They range from Springfield, Missouri, with a population 140,000, which has a $75 limit,[38] to the City of San Diego, California, with a population of over 1 million, which prohibits contributions over $250.[39]

That argument will be made not just in opposition to limits that are below $1,000, but also in support of efforts to raise or eliminate limits in the seventeen states

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[37] H.R. 164 ($500 limit), H.R. 276 ($500), H.R. 781 ($100), H.R. 2469 ($500), H.R. 3566 ($500), S. 951 ($100), 103d Cong., 1st Sess. (1993); H.R. 591 ($500), S. 116 ($100), 104th Cong., 1st Sess. (1995).

[38] Tr. at 10.

[39] Tr. at 129.

that have adopted the amount sustained in *Buckley*.[40] Implicit in the Eighth Circuit rationale in this case is the argument that nothing below $1,000 *in 1974 dollars* is permissible.[41] The implication of the Eighth Circuit's decision is that even the FECA limits, constitutional in 1976, are now subject to challenge. If that rationale is allowed to stand, at least 31 states and many more cities

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[40] *See* Alaska Stat. § 15.13.070 (1995); Ark. Code Ann. § 7-6-203 (Michie 1995); Cal. Government Code § 85301 (West 1995); Ga. Code Ann. § 21-5-41 (1993); La. Rev. Stat. Ann. § 18:1505.2 (West 1995); Me. Rev. Stat. Ann. 21-A § 1015 (1993); N. Y. Election Law 14-114 (1995); Okla. Stat. Ann. 21 § 187.1 (West 1995); S.C. Code Ann. § 8-13-1314 (Law Co-op 1995); Tenn. Code Ann. § 2-10-302 (1995); Ut. Stat. Ann. 17 § 2805 (1994); Vt. Stat. Ann. 17 § 2805 (Supp. 1995); W. Va. Code § 3-8-12 (1995). Two states impose a limit of $2,000 per election cycle -- the practical equivalent of the $1,000 per election limit: Haw. Rev. Stat. § 11-204 (1995), and Nev. Rev. Stat. § 294A.100 (1993). Three states impose limits on a "per year" basis, which as a practical matter means that for many candidates there is a $1,000 or lower limit: Minn. Stat. Ann. § 10A.27 (West 1995); R.I. Gen. Laws § 17-25-10.1 (1995); S.D. Cod. Laws § 12-25-1.1 (1995).

[41] *See* App. A-20 - A-21, citing *Day v. Holahan*, 34 F.3d 1356, 1365 (8th Cir. 1994).

can expect constitutional challenges.[42] And those challenges will have to be decided in the absence of guidance from this Court as to what the *Buckley* precedent means.

## III. This Court should address the uncertainty and conflicts in this area of law, rather than leave them to threaten the integrity of future elections.

A. Missouri's compelling interest in eliminating the ~~perception~~ of corruption is sufficient to justify its contribution limits, just as that interest was sufficient to justify the FECA limits at issue in *Buckley*. But there are additional, broader interests that demand the attention of this Court in considering whether to grant certiorari: preserving "the individual's citizen's confidence in government" and "preserving the integrity of the electoral process."[43] Citizens' confidence in elections is undermined when the election rules are unclear or changing. An election should be run like an athletic contest: the rules are

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[42] The lawsuits that will be filed challenging the new campaign reforms will be based on 42 U.S.C. § 1983, which means that each state or city defending the particular limit it chose will be exposed to substantial attorneys fees in the event the lower courts conclude, as did the Eighth Circuit, that choice was unconstitutional. The Court should resolve the issue presented here in order to protect those entities from significant financial exposure, which, at least in the case of initiatives, the public officials in those jurisdictions are helpless to avoid.

[43] *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 788-89 (1978).

established before the race begins, and they remain the same throughout. Otherwise, the victor may not be the fastest runner, but the runner who is best able to take advantage of, or even manipulate through timely lawsuits, the changes in the rules.

The 1996 Missouri elections will necessarily take place in an atmosphere of uncertainty. The rules on campaign contributions have changed four times in the last 15 months. Elections in other places and at other times need not be subject to that kind of uncertainty. Yet that is inevitable, if the Eighth Circuit's rationale is not addressed by this Court.

B. This Court has not addressed the critical question that follows from its holding in *Buckley*: what level of contribution must be permitted in order to protect freedom of political association, where contributors are fully able to speak independently? Nor does *Buckley* define criteria by which individuals' asserted right to make large contributions is to be judged.

In *Buckley*, this Court point to the obvious: that two First Amendment . . . freedoms are implicated . . . by campaign finance reform, freedom of speech and freedom of association. The Court recognized that freedom of speech is the value at issue when there is a limit on campaign expenditures -- independent or otherwise. With regard to contribution limits, the Court in *Buckley* also addressed freedom of speech. But the Court did so principally with regard to the ability of *candidates* to speak, not the ability of *contributors* to speak.

Candidates' freedom of speech would not be an issue here even if respondent Carver were himself a candidate. The district court declined Carver's invitation to find that

Missouri candidates cannot "amass[] the resources necessary for effective advocacy."[44] The court of appeals did not say that the district court's conclusion in that regard was clearly erroneous. And in the months since the district court lifted its preliminary injunction, Missouri candidates have proven that they can raise record amounts despite the new limits [45] -- just as the candidates for federal office proved by repeatedly setting new fundraising records despite the dire predictions of some members of Congress who urged higher federal limits in 1974.

In *Buckley* this Court did not ignore the interests of persons other than candidates. In fact, the Court specifically protected noncandidates' freedom of speech -- but in the context of independent expenditures.[46] And since *Buckley*, this Court has reiterated that strict scrutiny must be given to any attempt to restrict the ability of Carver and other citizens to speak independently, either individually or

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[44] 424 U.S. at 21.

[45] For example, in the 1992 election, the two major party candidates for Missouri Secretary of State collectively spent less than $400,000 on their primary and general election races. 1992 MISSOURI ANNUAL CAMPAIGN FINANCE REPORT, Missouri Ethics Commission (1993) at 1. The 1995 campaign finance reports of the declared major party candidates in the 1996 election show that they together have already raised more than $500,000, all in amounts of $300 or less.

[46] 424 U.S. at 48.

through some organized group.[47] But Missouri law imposes no restrictions on Carver's independent expenditures, and the evidence before the district court showed that as a practical matter Carver is still able to speak, even through the media, to solicit votes for those he wishes to see in public office.[48]

This Court's discussion in *Buckley* of the rights of *contributors* began not with mention of freedom of speech, but with the recognition that

> the primary First Amendment problem raised by the Act's contribution limitations is their restriction of one aspect of the contributor's *freedom of political association*.[49]

The Court then suggested a two-part analysis: (1) Is there "a 'significant interference' with protected rights of political association"? And if so, (2) has the state "demonstrate[d] a sufficiently important interest and employ[ed] means closely drawn to avoid unnecessary abridgment of associational freedoms"?[50] Without even suggesting that there was a particular basis for the selection of the $1,000 figure, the Court sustained it. In *Buckley*, then, this Court

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[47] *See, e.g., Austin v. Michigan Chamber of Commerce*, 494 U.S. 652, 655 (1990); *FEC v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238, 251-52 (1986).

[48] *See* Tr. at 24-25, 98-99.

[49] 424 U.S. at 24-25 (emphasis added).

[50] 424 U.S. at 25, *quoting Cousins v. Wagoda*, 419 U.S. 477, 488 (1975).

held a $1,000 contribution, among the many millions collected by presidential hopefuls, was enough to manifest a contributor's association with the candidate -- and that precluding a $1,001 contribution to a presidential candidate constituted only "a limited effect on First Amendment freedoms."[51]

Consistent with its focus on how contribution limits affect candidates' freedom of speech, this Court in *Buckley* stated a criterion for evaluating whether *candidates'* rights are infringed by the imposition of contribution limits. Thus, the limits are unconstitutional if they are so low that they prevent candidates from amassing the resources they need to campaign effectively for public office. But this Court did not say when *contributors'* constitutional rights are impermissibly infringed where they are not subject to expenditure restrictions. That is the question the Court faces here.

In finding its answer for that question, the Eighth Circuit drew guidance from this Court's reaction in *Buckley* to the argument that Congress should have chosen $2,000 rather than $1,000: "Such distinctions in degree become significant only when they can be said to amount to differences in kind."[52] What this Court meant by that statement is somewhat obscure. Implicitly, the Court indicated that a fifty per cent reduction from $2,000 did not constitute a "difference in kind" that would be "significant." Elsewhere the Court referred to the voluntary use of $100 limits,[53] without any suggestion that such limits were

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[51] 424 U.S. at 29.

[52] 424 U.S. at 30.

[53] 424 U.S. at 21 n. 23.

anything more than another "difference in degree." And the Court affirmed that the legislature -- not the courts -- had to decide precisely where to draw the line.[54]

The Eighth Circuit tried to find some substance in the two cases cited by this Court following its "difference in kind" language: *Kusper v. Pontikes*[55] and *Rosario v. Rockefeller*.[56] If those decisions addressed statutes that merely differed in the amount of lead time required for changing party affiliation before closed primaries (eleven months in *Rosario*; twenty-three months in *Kusper*), those cases would manifest only a "difference in degree." But they presented "differences in kind" because while the statute at issue in *Rosario* permitted voters to participate in annual primary elections, the law at issue in *Kusper* barred voters from participating in some primary elections.[57]

The FECA limits would differ "in kind" from an absolute prohibition on contributions to candidates. Such a prohibition would violate contributors' free speech rights because it would bar "the speech element of a contribution -- the message of support for a candidate."[58] But mere differences in the amount that can be contributed do not easily fit under the "differences in kind" label, particularly

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[54] 424 U.S. at 21.

[55] 414 U.S. 51 (1973).

[56] 410 U.S. 752 (1970).

[57] *Kusper v. Pontikes*, 414 U.S. at 57.

[58] *Pacific Gas & Electric Co. v. Public Utilities Comm'n*, 475 U.S. 1, 25 n. 3 (1986) (Marshall, J. concurring).

because the elements of speech and association are "only indirectly related to the size of the contribution."[59] This Court should consider this case in order to explain at what point that indirect relation is sufficient to demand constitutional scrutiny beyond that which applies to economic regulation.

C. When compared to the decision of the Ninth Circuit in *California Medical*,[60] the decision of the Eighth Circuit in this case demonstrates that courts can differ over not just the criteria but also the level of scrutiny to be applied in evaluating claims that particular levels of contribution limits are unconstitutional. The Eighth and Ninth Circuits were not the only courts to consider that question, of course. In many of the campaign reform cases decided since *Buckley*, the courts have struggled to determine what level of scrutiny is to be applied. That struggle even divided this Court when it heard the *California Medical* case.[61] The source for guidance is always the same: *Buckley v. Valeo*. But without further guidance from this Court, lower courts will continue to disagree over what *Buckley* means.

In *Buckley*, this Court at various points used terms such as "closest scrutiny" (424 U.S. at 25), "rigorous standard of review" (*id.* at 29), and "exacting scrutiny" (*id.* at 44). But the Eighth Circuit is wrong in claiming that the Court in using those words expressly endorsed the use of

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[59] *Id.*

[60] *California Medical Assn. v. FEC*, 641 F.2d 619 (9th Cir. 1980).

[61] *California Medical Assn. v. FEC*, 453 U.S. 182, 197 (1981).

the same degree of scrutiny for both contribution limits and expenditure limits. The Court quoted language from *Cousins v. Wigoda*[62] for the proposition that some form of strict scrutiny may apply in deciding free association claims, but in doing so implied -- correctly -- that such scrutiny would apply only where there was a "'significant interference' with protected rights of political association." The Court's language and holding stand for the proposition that anything that does not amount to a "'significant interference' with protected rights of political association"[63] can be justified by something less than "a sufficiently important interest," and that the legislature need not employ "means closely drawn to avoid unnecessary abridgment of associational freedoms" in imposing such a restriction.[64]

The holdings in this case demonstrate that what constitutes a "significant interference" cannot easily be decided by reference to *Buckley*. Precluding payments of more than $1,000 even to a candidate for the presidency did not significantly interfere with a contributor's freedom to associate with the candidate. But what does constitute such interference? Justice Marshall, writing for the plurality of this Court in *California Medical*, gave guidance, but did not authoritatively answer that question, when he observed that a limitation that does not preclude independent expenditures "does not restrict the ability of individuals to engage in protected political speech."[65]

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[62] 419 U.S. 477, 488 (1975).

[63] 424 U.S. at 25.

[64] *Id.*, quoting *Cousins*, 419 U.S. at 548.

[65] 453 U.S. at 199-200 n. 20.

Until the Eighth Circuit ruled in this case, the principal holding as to the level of scrutiny to be applied was that of the Ninth Circuit in *California Medical*. The Ninth Circuit there held that restrictions on contributions, unlike restrictions on expenditures, did not merit strict scrutiny -- a conclusion that it could reach either by holding that the restrictions did not "significantly interfere" with associational freedoms, or by holding that laws restricting contributions and those limiting campaign expenditures are subject to differing levels of scrutiny.[66] The plurality of this Court agreed, endorsing the proposition that Congress needs only "reasonably have concluded" that its enactment would attack a recognized ill.[67] In other words, the plurality would subject contribution limits to a rational basis standard, not to strict scrutiny.

The *California Medical* decisions of both the court of appeals and this Court were guided by this Court's action in *Buckley*. There the Court reached diverse answers to related but distinctive legal questions: Can the legislative branch limit contributions made directly to candidates?[68] And, can Congress limit the ability of groups to independently expend funds in support of candidates?[69] The Court answered the first question (the one implicated here), "Yes." It answered the second question, "No."

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[66] *California Medical*, 641 F.2d at 624.

[67] 453 U.S. at 199-200 n. 20 (Marshall, J. plurality).

[68] Part I-B of the Court's decision, 424 U.S. at 23-38.

[69] Part I-B of the Court's decision, 424 U.S. at 39-51.

It seems obvious that limitations on independent expenditures "impose far greater restraints on the freedom of speech and association than do . . . contribution limitations."[70] And it seems logical, as the Ninth Circuit and the plurality of this Court held, that the lesser restraints imposed by contribution limits are subject to a lower level of scrutiny. The Eighth Circuit's express contrary holding will provide a point of political and judicial dispute each and every time a limit on contributions is proposed, enacted, enforced, or challenged.

## IV. The Eighth Circuit's rationale imposes a substantial obstacle to campaign finance reform efforts.

A. The Eighth Circuit has created new rules regarding the justification required for legislation that affects the ability to make payments directly to candidates for public office -- rules that will, in at least three notable respects, severely inhibit the states', cities', and citizens' ability to attack the perception of public corruption.

The first is the Eighth Circuit's imposition of an evidentiary requirement that is entirely absent from *Buckley*. There this Court held that the government has a compelling interest in preventing even the appearance of corruption, that the government's interest is served by contribution limits, and that the precise level of the limits was something to be determined by the legislative branch. This Court then sustained the FECA limits without citing anything in the legislative record to explain the selection of $1,000 or its imposition on everything federal campaign. In fact, there is nothing in the FECA's history that explains the selection of $1,000 as anything but an arbitrary extraction from an

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[70] *Id.* at 44.

entirely different statute. After *Buckley*, states and local governments followed the federal model. They adopted their own limits based on determinations as to the needs of their particular circumstances, but without specific justification for the particular limit chosen, whether it was above, equal to, or below the FECA amount.

The Eighth Circuit decision has left governments throughout the United States without any idea as to what record they should have created as justification for their existing limits, or what record (if any) will justify the changes now under consideration. The history of the FECA would not meet the Eighth Circuit's standards. And if the extensive legislative history of the FECA did not contain what the Eighth Circuit now demands, how can states and local governments, which rarely keep legislative histories, be expected to comply?

States need to know what standard their enactments of contribution limits must meet: the low standard required of Congress in *Buckley*, or the much higher standard imposed by the Eighth Circuit here. And they need to know now, *before* the actions of their legislators or their voters affect current or future elections and draw lawsuits, such as this one, that result in alternating periods of new and old contribution limits.

B. The Eighth Circuit then imposes a rigid, federally-created line beyond which contribution limits may not pass. The use of such a line is inconsistent with what the "strict scrutiny" the Eighth Circuit applied would actually require: the tailoring of limits by the states to address their particular needs.

The Eighth Circuit has attributed to this Court the holding that legislatures can restrict only "large," and not

some broader range of contributions.[71] Assuming that is true, there must be some method of determining just what is a "large" contribution. This Court in *Buckley* implicitly called a $1,001 contribution "large," although it provided no criteria for defining that word. The Eighth Circuit has similarly reached its goal without providing any method of determining what is "large." Moreover, by suggesting that inflation is to be taken into account in determining what constitutes a large contribution today,[72] the Eighth Circuit has opened the door to claims that even $1,001 may no longer be a large contribution. In the Eighth Circuit's view, some abstract, monetary use of the word, "large," has gained constitutional significance in light of *Buckley*.

The Eighth Circuit ignored the compelling argument that defining "large" in the context of campaign contributions requires some element of proportionality. This Court in *Buckley* affirmed that a contribution of $1,001 is large in a presidential race in which tens of millions of dollars are spent. Yet, according to the Eighth Circuit, a state cannot find that $100 is a large contribution to a candidate for school board, or that $200 is a large contribution to a legislator -- despite the fact that such a contribution may well constitute a substantial portion of the total funds needed for such a race.

The Eighth Circuit's failure to include proportionality in its analysis runs headlong into a critical part of the strict scrutiny analysis that the court said applies to contribution limits: the need to tailor contribution limits to meet the particular interest being served. Although this Court permitted the use of a single limit for all federal

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[71] App. A-11-A-15, A-17, A-24, A-26-A-27.

[72] App. A-20.

campaigns, regardless of the size of the constituency, it did not limit the states and the cities to the same blunderbuss approach. By revisiting its *Buckley* holding and reconsidering the conclusion that Missouri's varying limits are not sufficiently narrow, this Court could both strengthen the requirement that restrictions on speech be narrowly tailored and at the same time ensure that the states remain functioning "laboratories" that can perform their assignment in the "science of experiments" that is our federal system.[73]

C. Finally, the Eighth Circuit's decision limits the ability of the people to use the initiative process to declare what they are better able than their elected representatives to decide: the point at which payments to politicians raise the perception of corruption. The Eighth Circuit is clearly wrong in suggesting[74] that legislators are a better judge of this issue than the electorate. The electorate is particularly well suited to judge what contributions appear to provide undue access to a candidate. Elected officials are almost certainly going to underestimate the likely effect of a particular contribution because it is in their interest to be able to obtain at least some funds from large contributors. Thus, the electorate's judgment in this case was entitled to substantially greater respect than it was accorded by the court of appeals.

This Court has recognized that states have a compelling interest in eliminating not only the reality, but

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[73] *Garcia v. San Antonio Metropolitan Transit Auth.*, 469 U.S. 528, 545 (1985).

[74] App. A-28-A-29.

even the perception of corruption.[75] The Eighth Circuit never says what evidence of the perception of corruption would be sufficient to support any particular contribution limit. If the votes of Missourians do not show that there is a perception of corruption when individuals hand checks of $100, $200, or $300 to officeholders, what would? The Eighth Circuit has cast doubt on the competence and legal ability of the people not only to decide for themselves the point at which they perceive corruption, but on their ability to make any decision that even arguably affects First Amendment rights. This Court should confirm the availability in the states of the initiative process.

## CONCLUSION

For the reasons stated above, this Court should grant the petition for writ of certiorari.

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[75] *Buckley*, 424 U.S. at 27; *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. at 787-89.

Respectfully submitted.

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# United States Court of Appeals

## FOR THE EIGHTH CIRCUIT

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No. 95-2608

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| Thomas D. Carver, | * | |
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| Appellant, | * | |
| | * | Appeal From the |
| | * | United States |
| | * | District Court for |
| | * | the Western |
| | * | District of Mo. |
| v. | * | |
| | * | |
| Jeremiah W. Nixon, Attorney General, State of Missouri; John Maupin, Chair, Missouri Ethics Commission, | * | |
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| Appellees. | * | |

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Submitted: September 13, 1995
Filed: December 19, 1995

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Before BOWMAN ROSS, and JOHN R. GIBSON, Circuit Judges.

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JOHN R. GIBSON, Circuit Judge.

The campaign contribution limits in Proposition A, Mo. Ann. Stat. § 130.100 (Vernon Supp. 1995), adopted by initiative, were declared constitutional by the district court, which refused to enjoin their implementation. Carver v. Nixon, 882 F. Supp. 901 (W.D. Mo. 1995). Thomas D. Carver appeals, arguing that the district court erred in ruling that the Proposition A contribution limits for state and local candidates did not violate a contributor's freedoms of speech and association under the First Amendment. We conclude that section 130.100 is unconstitutional and reverse the judgment of the district court.

In the spring of 1994, the Missouri General Assembly passed Senate Bill 650, adopting campaign contribution limits to become effective January 1, 1995. See Mo. Rev. Stat. § 130.032 (1994). Voters approved Proposition A at the November 8, 1994 election. Proposition A adopted lower contribution limits and became effective immediately.[1]

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[1] Proposition A provides:

> There shall be the following limitations on campaign contributions:
>
> (1) No person or committee shall make a contribution to any one candidate or candidate committee with an aggregate value in excess of:
>
> (a) $100 per election cycle per candidate in districts with fewer than 100,000 residents[.]
>
> (2) [sic] $200 per election cycle per candidate, other than statewide candidates, in districts of 100,000 or more residents. For purposes of this

The Missouri Attorney General issued an opinion stating that, although both Proposition A and Senate Bill 650 "concern campaign finance, they are not irreconcilably inconsistent." Missouri Ethics Commission, Op. Atty. Gen. No. 218-94 (Dec. 6, 1994), at 4. The Attorney General stated that the two provisions stand together in regulating

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(footnote cont.)

section "stateside candidates" refers to those candidates seeking election to the office of Governor, Lieutenant Governor, Attorney General, Auditor, Treasurer and Secretary of State.

(3) [sic] $300 per election cycle per statewide candidate.

(2) No person, entity or committee shall make a contribution to any other persons, entities or committees for the purpose of contributing to a specific candidate which when added together with contributions made directly to the candidate or to the candidate's committee, will have an aggregate value in excess of the limits stated in section 1.

(3) No candidate or candidate committee shall solicit or accept any contribution with an aggregate value in excess of the limits stated in this section.

(4) For purposes of this section the term "candidate" shall include the candidate, the candidate's treasurer, and the candidate's committee and any contribution to the candidate's treasurer or candidate committee shall be deemed a contribution to the candidate.

Mo. Ann. Stat. § 130.100.

campaign finance, and to the extent there is a conflict between specific provisions of the statutes, the more restrictive provision prevails. Id. Thus, the lower campaign contribution limits of Proposition A control.[2]

The contribution limits in Proposition A are limits "per election cycle per candidate."[3] Mo. Ann. Stat. § 130.100. The statute provides that no person or committee shall make a contribution to any one candidate or candidate committee with an aggregate value in excess of: (a) $100 for candidates in districts with fewer than 100,000 residents; (b) $200 for other than statewide candidates in districts of 100,000 or more residents; and (c) $300 for statewide candidates. Mo. Ann. Stat. § 130.100. Governor, Lieutenant Governor, Attorney General, Auditor, Treasurer, and Secretary of State are enumerated as statewide candidates for purposes of the section. Mo. Ann. Stat. § 130.100(2) [sic].

Senate Bill 650 imposed limits for each election. Thus, on an election cycle basis, the Senate Bill 650 limits are twice the amount enumerated in the text of Senate Bill 650. See Mo. Rev. Stat. § 130.032.1. Contributions are

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[2] Other provisions of Senate Bill 650 and Proposition A were the subject of litigation in Shrink Missouri Government PAC v. Maupin, 892 F. Supp. 1246 (E.D. Mo. 1995). We heard the appeal in that case on the same day as this appeal. See Shrink Mo. Gov't PAC v. Maupin, No. 95-2857, slip. op. (8th Cir. Dec. 19, 1995).

[3] An election cycle is "the period of time from general election for an office until the next general election for the same office." Mo. Stat. Ann. § 130.011 (Vernon Supp. 1995). Thus, an election cycle includes the primary and general election.

limited to $1,000 per election for Governor and other statewide offices, as well as for candidates in districts with a population of at least 250,000. Mo. Rev. Stat. §§ 130.032.1(1), (6). There is a $500 per election contribution limit for candidates for State Senate, and for any office in electoral districts with a population between 100,000 and 250,000. Mo. Rev. Stat. §§ 130.032.1(2), (5). Contributions are limited to $250 per election for candidates for State Representative and for offices in districts of a population less than 100,000. Mo. Rev. Stat. §§ 130.032.1(3), (4).

Carver brought this action to enjoin enforcement of Proposition A. He asserted that Proposition A restricted his ability to make contributions in violation of his rights of free speech and association. He also argued that the limits are so low as to unconstitutionally interfere with his ability to support candidates and to communicate with potential supports for fundraising purposes. He argued that Proposition A is not narrowly tailored to meet the State's interests of avoiding corruption or the appearance of corruption, and will not prevent wealthy special interests from opposing candidates.

After hearing evidence and receiving briefs, the district court denied the injunction. Carver, 882 F. Supp. at 902. The court recognized that Buckley v. Valeo, 424 U.S. 1 (1976) (per curiam), governed the issues. Carver, 882 F. Supp. at 903. The court read from Buckley that "a major purpose of the First Amendment is to protect political speech," and that "[l]imitations on these rights are permissible where a compelling state interest is served, if the limitations imposed are narrowly tailored to serve that interest." Carver, 882 F. Supp. at 903-04. The court observed that the Supreme Court has recognized that governments have a compelling interest in preventing

corruption and the appearance of corruption that may result from individuals making large contributions to candidates. Id. at 904 (citing Buckley, 424 U.S. at 25-27).

The district court ruled that the Proposition A limits were not so low as to be an unconstitutional restriction of First Amendment rights. Id. at 904-05. The court held that "the law is tailored narrowly enough to help the state meet its goals of eliminating some of the means of corruption and of avoiding the appearance of corruption." Id. at 906. The court observed that Proposition A does not prevent candidates from spending their own money on their campaigns.[4] Id. The court stated that, although Proposition A does not address all of the problems related to campaign finance, it is a positive step toward eliminating political corruption, even if it is not comprehensive. Id. It may not close all of the loopholes, but that does not make it unconstitutional. Id. Carver appeals.

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[4] This issue was not before the district court. However, the district court in Shrink Missouri Government PAC, 882 F. Supp. at 1251, addressed the applicability of Proposition A to the candidate's own contributions. The district court found that when Proposition A and Mo. Rev. Stat. § 130.011(12)(a) (1994) are read together, the statute limits a candidate's ability to spend his own money on his campaign. Id. Finding that Buckley prohibits a limit on the amount a candidate may contribute to his own campaign, the district court enjoined the application of section 130.011(12)(a) to the Proposition A contribution limits. Shrink Mo. Gov't PAC, 882 F. Supp. at 1251. We affirmed this holding in Shrink Missouri Government PAC v. Maupin, No. 95-2857, slip. op. at 3-4.

I.

Carver argues before us, as he did in the district court, that the Proposition A contribution limits restrict his First Amendment rights to political communication and association. He contends that, because the Proposition A limits burden fundamental First Amendment rights, they are subject to strict scrutiny and do not serve a compelling state interest. The State argues that we should apply an intermediate standard of review, but even if we apply strict scrutiny, the Proposition A limits are narrowly tailored to address a compelling state interest.

The Supreme Court identified the interests implicated by contribution limits in Buckley, 424 U.S. at 14 (citations omitted):

> [C]ontribution and expenditure limitations operate in an area of the most fundamental First Amendment activities. . . . The First Amendment affords the broadest protection to such political expression in order "to assure [the] unfettered interchange of ideas for the bringing about of political and social changes desired by the people." . . . "[T]here is practically universal agreement that a major purpose of that Amendment was to protect the free discussion of government affairs, . . . of course includ[ing] discussions of candidates . . . ."

"[C]ontribution and expenditure limitations impose direct quantity restrictions on political communication and

association by persons, groups, candidates, and political parties . . . ." Id. at 18.

In view of these fundamental interests, the Court has instructed that campaign contribution limits are "subject to the closest scrutiny." Id. at 25 (quoting NAACP v. Alabama, 357 U.S. 449, 460-61 (1958)). Under this standard, "a significant interference with protected rights of political association may be sustained" only when the State can demonstrate "a sufficiently important interest and employs means closely drawn to avoid unnecessary abridgment of associational freedoms." Id. (quotations omitted) (citing Cousins v. Wigoda, 419 U.S. 477, 488 (1975); NAACP v. Button, 371 U.S. 415, 438 (1963); Shelton v. Tucker, 364 U.S. 479, 488 (1960)).

After identifying the interests and the applicable level of review, the Court in Buckley, 424 U.S. at 58-59, upheld the constitutionality of the $1,000 contribution limit for federal elected offices. The Court reasoned that the $1,000 contribution limit focused precisely on the problem of large campaign contributions and, therefore, was narrowly tailored to the goal of limiting corruption and the appearance of corruption. Id. at 26-28. The Court pointed out that a contribution limit "entails only a marginal restriction upon the contributor's ability to engage in free communication" and does not materially undermine "the potential for robust and effective discussion of candidates and campaign issues . . . ." Id. at 20-21, 29. The Court characterized a contribution as only "a general expression of support for the candidate and his views," explaining that "the transformation of contributions into political debate involves speech by someone other than the contributor." Id. at 21.

The Court recognized that "contribution restrictions could have a severe impact on political dialogue if the limitations prevented candidates and political committees from amassing the resources necessary for effective advocacy." Id. at 21. The Court found no evidence that the $1,000 limit prevented candidates and political committees from amassing the resources necessary for effective advocacy. Id. at 21. The Court refused to analyze the propriety of the specific dollar amount of the contribution limits. Id. at 30. The Court cautioned, however, that if the contribution limits were too low, the limits could be unconstitutional. Id.

The Court struck down the independent expenditure limitation which prohibited a candidate from using more than $1,000 of his own money in his campaign and also limited a candidate's total campaign expenditures. Id. at 39. The Court distinguished limits on expenditures from limits on contributions, concluding that the expenditure limits were more restrictive of speech, as they "necessarily reduce[ ] the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached. This is because virtually every means of communicating in today's mass society requires the expenditure of money." Id. at 19 (footnote omitted).

In addition, the Court concluded that the government interest in preventing corruption or the appearance of corruption could not justify the ceiling on independent expenditures. Id. at 45, 53-54. The Court found little relationship between the interest of avoiding corruption and limiting expenditures to one's own campaign or limiting overall campaign expenditures, particularly in light of the limit on campaign contributions. Id. at 55.

The State argues that the Court in Buckley applied strict scrutiny only to legislation limiting independent expenditures and applied a lower, intermediate standard of review to contribution limits. Citing the passages from Buckley referred to above, the State argues that contribution limits are entitled to an intermediate level of scrutiny because contributions are only symbolic expression of support, and limiting contributions does not infringe on the contributor's freedom to discuss candidates and issues.

We recognize that the Court distinguished restrictions on independent expenditures from restrictions on contributions. Buckley, 424 U.S. at 20-21. Since Buckley, members of the Court, in dicta, have indicated that contribution limits should receive a lower level of scrutiny. See Federal Election Comm'n v. Massachusetts Citizens for Life, 479 U.S. 238, 259-60 (1986); California Medical Ass'n v. Federal Election Comm'n, 453 U.S. 182, 196 (1981) (Marshall, J., plurality); Citizens Against Rent Control v. Berkeley, 454 U.S. 290, 301 (1981) (Marshall, J., concurring in judgment). In contrast, other members of the Court strongly disagree, arguing that nothing less than strict scrutiny should apply to contribution limits. See California Medical Ass'n, 453 U.S. at 201-02 (Blackmun, J., concurring in part and in judgment); Citizens Against Rent Control, 454 U.S. at 302 (Blackmun and O'Connor, JJ., concurring in judgment) ("ordinance cannot survive constitutional challenge unless it withstands 'exacting scrutiny'"). The Court has not ruled that anything other than strict scrutiny applies in cases involving contribution limits. When the Court in Buckley analyzed the contribution limits, it articulated and applied a strict scrutiny standard of review. Id. at 25. Therefore, like other courts since the Buckley decision, we must apply the "rigorous" standard of review articulated in Buckley. See e.g., Harwin v. Goleta Water Dist., 953 F.2d 488, 491 n.6

(9th Cir. 1991) (recognizing that contribution limits may be subject to a lower level of scrutiny, but requiring the government to show "a sufficiently important interest and employ[ ] means closely drawn to avoid unnecessary abridgement of associational freedoms") (quoting Buckley, 424 U.S. at 25).

Moreover, that voters adopted Proposition A by initiative does not affect the applicable level of scrutiny. We must analyze Proposition A under the same standard that we apply to the product of a legislature. "It is irrelevant that the voters rather than a legislative body enacted [a statute], because the voters may no more violate the Constitution by enacting a ballot measure than a legislative body may do so by enacting legislation." Citizens Against Rent Control, 454 U.S. at 295.

Thus, we apply strict scrutiny in this case, and the State must show that the Proposition A limits are narrowly tailored to meet a compelling state interest. "When the Government defends a regulation on speech . . . it must do more than simply 'posit the existence of the disease sought to be cured.' . . . It must demonstrate that the recited harms are real, . . . and that the regulation will in fact alleviate these harms in a direct and material way." United States v. National Treasury Employees Union, 115 S.Ct. 1003, 1017 (1995) (quoting Turner Broadcasting Sys., Inc. v. Federal Communications Comm'n, 114 S.Ct. 2445, 2470 (1994) (Kennedy, J., plurality)).

In Buckley, 424 U.S. at 25-26, the Court identified the compelling interest as "the prevention of corruption and the appearance of corruption spawned by the real or imagined coercive influence of large financial contributions on candidates' positions and on their actions if elected to office." Id. at 25 (emphasis added). The Court reiterated

this interest at least seven times. Id. at 25-29. It found it unnecessary to look beyond this primary interest to the remaining interests offered to justify contribution limits. Id. at 25-26 (identifying the other interests as equalizing the relative ability of all citizens to affect the outcome of an election and slowing the skyrocketing cost of political campaigns). The Court, in discussing large contributions, specifically referred to disturbing examples surfacing after the 1972 election.[5] Id. at 27. Examining the 1974 election, the Court found that the $1,000 contribution limit would not severely impact political dialogue, pointing out that most contributions (94.9 percent in the 1974 election) came from contributions of $1,000 or less. Id. at 21 n.23, 26 n.27. The Court decided that in addition to requiring the disclosure of contributions, Congress was entitled to conclude that contribution limits were necessary "to deal with the reality or appearance of corruption inherent in a system permitting unlimited financial contributions." Id. at 28.

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[5] In Buckley, 424 U.S. at 27 n.28, the Court cites the court of appeals discussion of such abuses in Buckley v. Valeo, 519 F.2d 821, 839-40 nn.36-38 (D.C. Cir. 1975) (per curiam). The court of appeals listed examples of large contributions including: dairy organizations pledging two million dollars to the Nixon campaign in an effort to schedule a meeting with White House officials regarding price supports, id. at 839 n.36; contributions from the American Dental Association to incumbent California congressmen, id. at 839 n.37; contributions by H. Ross Perot, whose company supplied data processing for medicare and medicaid programs, to members of the House Ways and Means Committee, the Senate Finance Committee, and the House Appropriations Committee, id.; and large contributions by those seeking ambassadorial appointments from President Nixon, id. at 840 n.38.

The Supreme Court recently reaffirmed that the compelling interest identified in Buckley was limiting large contributions to candidates. The Court stated:

> Buckley identified a single narrow exception to the rule that limits on political activity were contrary to the First Amendment. The exception relates to the perception of undue influence of large contributors to a candidate:
>
> > To the extent that large contributions are given to secure a political quid pro quo from current and potential office holders, the integrity of our system of representative democracy is undermined. . . .
> >
> > . . . Congress could legitimately conclude that the avoidance of the appearance of improper influence is also critical . . . if confidence in the system of representative Government is not to be eroded to a disastrous extent.

Citizens Against Rent Control, 454 U.S. at 296-97 (citations and quotations omitted) (emphasis added).

The district court held that "[u]nder Buckley, Missouri clearly has a compelling state interest in limiting campaign contributions." Carver, 882 F. Supp. at 904. This does not square with the interest of limiting "large

campaign contributions" as defined in Buckley. The District court's decision substantially broadens the compelling interest identified in Buckley. The district court erred as a matter of law in extending Buckley to the infinitely broader interest of limiting all, not just large, campaign contributions.

The rationale of the district court's opinion is perhaps explained by the State's argument before us. The State sets out the compelling state interest justifying Proposition A in general terms. The State identifies the compelling interest as that of attacking, "not just the reality, but even the appearance or perception of corruption that may take the form of a 'quid pro quo' between a contributor and a candidate."[6] The State, however, fails to

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[6] In its amicus brief, The Association of Community Organizations For Reform Now (ACORN) adds the two interests not reached in Buckley to justify the contribution limits in Proposition A. ACORN includes equalizing the relative ability of all citizens to affect the outcome of elections as additional justification for the Proposition A limits. This latter interest is close to running afoul of the Court's statement in Buckley, 424 U.S. at 48-49, that restricting "the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment . . . ." See also Shrink Mo. Gov't PAC, No. 95-2857, slip op. at 8-9. In addition, ACORN states that supporters of Proposition A sought to change the nature of local campaigns away from "hot button sound bites" in thirty-second television commercials toward a substantive discussion of the issues. As laudable as this interest may appear, these comments, on their face, manifest a content based restriction on expression and association. See Turner Broadcasting Sys., 114 S.Ct. at 2459 (discussing content based restrictions).

refine this general interest consistent with the compelling interest defined by the Court in Buckley as limiting the reality or perception of undue influence and corruption from large contributions. See Citizens Against Rent Control, 454 U.S. at 296-97. We examine the contribution limits in section 130.100 in light of this compelling interest.

III.

A.

Our review of the district court's factual findings in this First Amendment case is governed by the Supreme Court's recent decision of Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, 115 S.Ct. 2338 (1995). The Court instructed that, when considering whether the petitioners' activity is protected speech, we have "a constitutional duty to conduct an independent examination of the record as a whole, without deference to the trial court." Id. at 2344 (quoting Bose Corp. v. Consumers Union of United States, Inc., 466 U.S. 485, 499 (1984)). The Court explained:

> The requirement of independent appellate review is a rule of federal constitutional law . . . . [T]he reaches of the First Amendment are ultimately defined by the facts it is held to embrace, and we must thus decide for ourselves whether a given course of conduct falls on the near or far side of the line of constitutional protection. Even where a speech case has originally been tried in a federal court, subject to the provision of Federal Rule of Civil Procedure 52(a) that findings of fact shall not be set aside unless

> clearly erroneous, we are obliged to make a fresh examination of crucial facts.

Id. (citations and quotations omitted). Hurley requires that we independently review the facts to decide whether certain conduct is entitled to First Amendment protection. The factual findings surrounding the determination of whether the Proposition A limits unconstitutionally interfere with Carver's free speech and association rights are so intermingled with the constitutional questions of law that we are obligated "to make an independent examination of the whole record . . . ." Id. (quoting New York Times Co. v. Sullivan, 376 U.S. 254, 285 (1964)).

B.

In considering Carver's argument that "the limits imposed by Proposition A are so low as to be an unconstitutional restriction of First Amendment rights of speech and association," the district court acknowledged that "what determines the constitutionality of the limits is the dollar amount of the limits." Carver, 882 F. Supp. at 904-05. Comparing the $1,000 limit on contributions to candidates for federal offices in Buckley with the Proposition A limits, the court emphasized the incremental nature of the Proposition A limits, which vary according to population and the office being sought.[7] Id. at 905. The court concluded that "[t]he stairstepping of the contribution limits demonstrates a more narrow tailoring of Proposition A to fit the state's goal." Id.

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[7] The Proposition A limits stand alone, as Missouri does not provide public funds for campaign purposes, unlike the United States and a number of other states.

The district court observed that there was no evidence that the Proposition A limits would dramatically affect campaign funding or candidates' ability to communicate to the voters. Id. The court relied on the fact that twenty-seven states and the federal government have imposed contribution limits, and that an overwhelming seventy-four percent of Missouri voters "determined that contribution limits are necessary to combat corruption and the appearance thereof." Id. The court found that "Proposition A does not favor incumbents and that many challengers welcome limits on contributions as a way to stop incumbents from accepting large contributions." Id. Finally, the district court referred to expert testimony indicating that more people will contribute to campaigns when contribution limits are in place, because people feel that the candidates will appreciate and be more responsive to smaller contributors. Id. at 905-06.

These findings may address the desirability of campaign contribution limits, but they do not focus on whether the Proposition A limits are narrowly tailored to address the reality or appearance of corruption associated with large contributions. While indicating popular sentiment in favor of campaign finance reform, the fact that seventy-four percent of the voters approved Proposition A does not assist our analysis, because voters may not adopt an unconstitutional law any more than the legislature. Citizens Against Rent Control, 454 U.S. at 295; see also U.S. Term Limits, Inc. v. Thornton, 115 S. Ct. 1842, 1871 (1995) (holding unconstitutional congressional term limits adopted by voter initiative).

The district court's discussion shows the district court posed, but did not answer, the question of whether the contribution limits were too low. Instead, the court only concluded that the stairstepping of the limits demonstrated

that the limits were narrowly tailored. The fact that Proposition A sets forth graduated limits has nothing to do with whether the limits are so low as to be unconstitutional.

C.

Carver argues that the evidence establishes that the limits in Proposition A violate his right to associate as a contributor. The State responds that Carver has not proved that Proposition A limits his right to contribute at a meaningful level. The State contends that the Proposition A limits do not prevent Carver from effectively speaking on behalf of a candidate or joining with other individuals to express themselves in constitutionally protected independent committees, such as those involved in Day v. Holahan, 34 F.3d 1356 (8th Cir. 1994), cert. denied, 115 S. Ct. 936 (1995). The State argues that there was no proof that contributors like Carver could not find other outlets for effectively expressing their message in Missouri elections.

While the extent of Carver's testimony is at best skeletal, it is sufficient to demonstrate that Carver has contributed, and intends to contribute in the future, amounts in excess of the Proposition A limits to support his interest in "good candidates" and "good government." The State's argument that Carver could continue to exercise his First Amendment rights by joining an independent group does not address whether the limits are so low as to prevent Carver from freely associating with a candidate.

The State points out that Buckley does not require specific proof of the maximum contribution limit, and that we may not use "a scalpel" to invalidate Proposition A. It is true that the Court did not analyze the propriety of the $1,000 limit. Indeed, the Court observed that while

Congress could have structured the limits in a graduated fashion for congressional and presidential campaigns, its failure to do so did not invalidate the legislation. Buckley, 424 U.S. at 30. The Court reiterated the court of appeals' statement that "a court has no scalpel to probe" whether a different ceiling might not serve as well. Id. Although we certainly are not free to fine tune the limits established by Proposition A, and we generally accept the limits established by the legislature, Buckley instructs that we must invalidate that judgment when the "distinctions in degree" become "differences in kind." Id.

The Court in Buckley, 424 U.S. at 30, pointed to two decisions, Kusper v. Pontikes, 414 U.S. 51 (1973), and Rosario v. Rockefeller, 410 U.S. 752 (1973), as illustrating differences in kind. In Rosario, 410 U.S. at 754, the Court approved a party enrollment provision requiring a voter to enroll in a party at least thirty days before the general election in order to vote in the next party primary. The Court held that, although the cutoff date for enrollment could occur up to eight months before a presidential primary, and up to eleven months before a nonpresidential primary, the requirement was not arbitrary and unconnected to the important state goal of inhibiting party raiding. Id. at 760.

The Court, however, struck down a party enrollment requirement in Kusper, 414 U.S. at 52, which prohibited a voter from voting in the primary election of a political party if he had voted in the primary of another party in the preceding twenty-three months. The Court reaffirmed its decision in Rosario, but held that the enrollment requirement at issue caused a two-year delay for certain voters, and thus, violated the voter's right to free political association. Id. at 61. Although the Court allowed an eight-month delay in Rosario, the almost two-year delay in

Kusper, nearly three times the delay approved in Rosario, crossed the constitutional line. Thus, the enrollment requirement in Kusper amounted to a "difference in kind."

Similarly, in Day, 34 F.3d at 1365, we dealt with the issues raised by very low contribution limits. We considered the constitutionality of a Minnesota statute imposing a $100 limit on contributions to political committees. Although Day did not consider contribution limits to candidates, we compared the $100 limit on contributions to political committees in Day to the $1,000 limit on contributions to candidates considered in Buckley. Day, 34 F.3d at 1366. After recognizing that the $1,000 limit in Buckley was not a "constitutional minimum," we nevertheless concluded that the $100 limit significantly impaired the ability of contributors to exercise their First Amendment rights. Id. We held that the limit was "too low to allow meaningful participation in protected political speech and association," and we concluded that the law was "not narrowly tailored to serve the state's legitimate interest in protecting the integrity of the political system." Id. In reaching this conclusion, we relied on the fact that about 25 to 33 percent of the contributions to political committees in the most recent election exceeded the $100 limit, and that after adjusting for inflation, the limit was about 4 percent of the $1,000 limit in Buckley. Id. Our observation in Day about the effect of inflation applies with equal force in this case.

The district court referred to the fact that twenty-seven states have contribution limits, but it did not analyze the limits in detail. Any meaningful comparison of these limits must include consideration of not only the amount, but also whether the limits are per election cycle or per election. The Proposition A limits, ranging from $100 to $300 per election cycle, are dramatically lower than the

$2,000 limit per election cycle approved in Buckley.[8] Not only are the Proposition A limits much lower than the federal limits, they are lower than the limits in any other state. Two states, Montana and Oregon, have limits for state senate races that equal those in Proposition A, but their limits for statewide offices and state representatives are greater than those in Missouri.[9]

The question thus becomes whether Missouri must adopt the lowest contribution limits in the nation to remedy

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[8] Employing our analysis in Day, the amicus brief of the American Civil Liberties Union points out that after adjusting for inflation, Proposition A's $300 limit is 6 percent of the limit per election cycle considered in Buckley, the $200 limit is 4 percent of the Buckley limit per election cycle, and the $100 limit is only 2 percent of the Buckley limit per election cycle.

[9] Montana and Oregon recently adopted these restrictive contribution limits by initiative. See Mont. Code Ann. § 13-37-216 (Supp. 1995); 1995 Or. Laws 1, 3. The Montana limits are on a per election basis, but when they are converted to an election cycle basis, the limits are: (1) $800 to candidates filed jointly for the office of Governor and Lieutenant governor, (2) $400 to candidates in a statewide election other than Governor and Lieutenant Governor, and (3) $200 to candidates for any other public office. Mont. Code Ann. § 13-37-216. When similarly considered, the Oregon limits are: (1) $1,000 to a candidate for "Governor, Secretary of State, State Treasurer, Superintendent of Public Instruction, Attorney General, Commissioner of the Bureau of Labor and Industries or judge of the Supreme Court, Court of Appeals or Oregon Tax Court" and (2) $200 to a candidate for State Senator or State Representative. 1995 Or. Laws 3.

the corruption caused by large campaign contributions. The State presented testimony at trial about a $420,000 contribution from a Morgan Stanley political action committee to various races in north Missouri, and about the "Keating Five" scandal.[10]

None of these examples prove that the Proposition A limits are narrowly tailored. A $420,000 contribution is a far cry from the limits in Proposition A, and the other examples involve individual conduct leading to criminal prosecution. We cannot conclude that the limits in Proposition A are in any way narrowly tailored or carefully drawn to remedy such situations. See Massachusetts Citizens for Life, 479 U.S. at 265 (we may "curtail speech only to the degree necessary to meet the particular problem at hand"); Day, 34 F.3d at 1366.

In considering whether the Proposition A limits are narrowly tailored, we must also recognize that the limits were not adopted in a vacuum. The question is not simply that of some limits or none at all, but rather Proposition A as compared to those in Senate Bill 650, which was to become effective January 1, 1995.

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[10] The ACORN amicus brief also agrees that the Proposition A limits are necessary and narrowly tailored, citing the Dewey Crump and William Webster scandals. Dewey Crump was a Missouri State Representative accused of sponsoring legislation in exchange for kickbacks. William Webster was Missouri's Attorney General who pleaded guilty to a charge of conspiracy to misuse state property.

The Proposition A limits are only ten to twenty percent of the higher limits in Senate Bill 650.[11] The State

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[11] On an election cycle basis, the contribution limits contained in Proposition A and Senate Bill 650 compare as follows:

| Office | Senate Bill 650 | Proposition A | Percentage of Senate Bill 650 |
|---|---|---|---|
| Statewide Races | $2,000[a] | $300[b] | 15% |
| State Senator | $1,000[c] | $200[d] | 20% |
| State Representative | $500[e] | $100[f] | 20% |
| Other Races: Less Than 100,000 Pop. | $500[g] | $100[h] | 20% |
| 100,000 to 250,000 Pop. | $1,000[i] | $200[j] | 20% |
| More Than 250,000 Pop. | $2,000[k] | $200[l] | 10% |

[a] Mo. Rev. Stat. § 130.032.1(1).

[b] Mo. Ann. Stat. § 130.100(3).

[c] Mo. Rev. Stat. § 130.032.1(2).

[d] Mo. Ann. Stat. § 130.100(2). Missouri State Senate districts consist of approximately 150,000 people. 1995-96 State of Missouri Official Manual, at 123.

[e] Mo. Rev. Stat. § 130.032.1(3).

[f] Mo. Ann. Stat. § 130.100(1)(a). Missouri

produced no evidence as to why the Proposition A limits of $100, $200, and $300 were selected. Further, the State presented no evidence to demonstrate that the limits were narrowly tailored to combat corruption or the appearance of corruption associated with large campaign contributions. See Buckley, 424 U.S. at 25. The record is barren of any evidence of a harm or disease that needed to be addressed between the limits of Senate Bill 650 and those enacted in Proposition A. See National Treasury Employees Union, 115 S. Ct. at 1017.

In ruling that the contribution limits in Buckley were narrowly tailored, the Supreme Court pointed out that only about five percent of the contributors in the 1974 election gave more than the $1,000 limit. Buckley, 424 U.S. at 21 n.23. The State's own evidence shows that a much higher percentage of contributions will be impacted by the limits in Proposition A. At trial, the State presented exhibits showing contributions made in past races for Auditor, State Senate

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(foot cont.)

State Representative districts consist of approximately 30,000-33,000 people. 1995-96 State of Missouri Official Manual, at 184-85.

[g] Mo. Rev. Stat. § 130.032.1(4).

[h] Mo. Ann. Stat. § 130.100(1)(a).

[i] Mo. Rev. Stat. § 130.032.1(5).

[j] Mo. Ann. Stat. § 130.100(2).

[k] Mo. Rev. Stat. § 130.032.1(6).

[l] Mo. Ann. Stat. § 130.100(2).

and State Representative.[12] According to the State's exhibits, in the 1994 Auditor's race, 19.5 percent of the contributors gave more than the $300 Proposition A limit, but less than the $1,000 Senate Bill 650 limit.[13] In the State Senate race, 21.6 percent of the contributors gave more than the $200 Proposition A limit, but less than the $1,000 Senate bill 650 limit on an election cycle basis.[14] In the State Representative race, 19.0 percent of the

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[12] The races were (1) the 1994 State Auditor's race, (2) the 1992 Twenty-Seventh District State Senate race, and (3) the 1992 Tenth District Missouri House of Representatives race. The State selected these sample races because they were among the races with the highest contributions.

[13] 19.5 percent is actually too low because the State's exhibit is based on the $1,000 per election limit in Senate Bill 650, and not the $2,000 limit per election cycle. The State's exhibit failed to show the actual number of contributors giving more than the $300 Proposition A limit but less than the $2,000 election cycle limit in Senate Bill 650. The State's exhibit showed that 19.5 percent of the contributions were between $301 and $1,000, and 8.0 percent were more than $1,000. The exhibit does not indicate what percent of the contributions over $1,000 should also be included as being within the $2,000 Senate Bill 650 election cycle limit. While the percentage is undoubtedly higher than the 19.5 percent set out above, the precise amount is not shown.

[14] This is the only race where the exact percentage of contributors giving more than the Proposition A limit but less than the Senate Bill 650 limit on an election cycle basis may be determined from the data presented by the State.

contributors gave more than the $100 Proposition A limit, but less than the $250 Senate Bill 650 limit.[15]

Further, the State's exhibits show that 27.5 percent of the contributors in the 1994 Auditor's race gave more than the $300 Proposition A limits. In the State Senate race, 23.7 percent of the contributors gave more than the $200 Proposition A limit. Finally, in the State Representative race, 35.6 percent of the contributors gave more than the $100 Proposition A limit.

The State made no showing as to why it was necessary to adopt the lowest contribution limits in the nation and restrict the First Amendment rights of so many contributors in order to prevent corruption or the appearance of corruption associated with large campaign contributions. Proposition A substantially limits Carver's ability to contribute to candidates and will have a considerable impact on many contributors besides Carver. The State simply argues that limits which are nearly four times as restrictive as the limits approved in Buckley are narrowly tailored. The State argues we may not fine tune the specific dollar amount of the limits, but fails to demonstrate that the Proposition A limits are not a "difference in kind." See Kusper, 414 U.S. at 61

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[15] Again, the State's calculation is based on the $250 per election limit in Senate Bill 650, and not on the $500 limit per election cycle. The State's exhibit showed that 19.0 percent of the contributions were between $101 and $250, 15.7 percent were between $251 an $1,000, and 0.9% were more than $1,000. We have no way of knowing what portion of the contributions between $251 and $1,000 fell below the $500 limit per election cycle. Undoubtedly, some of these contributions should be included as between the Proposition A and Senate Bill 650 limits.

(overturning an enrollment requirement approximately three times longer than that approved by the Court in Rosario). We hold that the Proposition A limits amount to a difference in kind from the limits in Buckley. The limits are not closely drawn to reduce corruption or the appearance of corruption associated with large campaign contributions. Thus, the State has failed to carry its burden of demonstrating that Proposition A will alleviate the harms in a direct and material way, Turner Broadcasting System, 114 S. Ct. at 2470, or is closely drawn to avoid unnecessary abridgement of associational freedoms, Buckley, 424 U.S. at 25. Accordingly, we conclude that the Proposition A contribution limits unconstitutionally burden the First Amendment rights of association and expression.

IV.

The State argues from Turner Broadcasting System, 114 S. Ct. at 2471, that we "must accord substantial deference to the predictive judgments" of the legislature. The Court explained the deference accorded to congressional action is limited to assuring that "in formulating its judgments, Congress has drawn reasonable inferences based on substantial evidence." Id. The State argues that we must accord this same deference to Proposition A adopted through the initiative process by the citizens of Missouri.

There are two obstacles in the path of the State's argument. First, as we have observed before, the voters may no more violate the Constitution than the legislature. Citizens Against Rent Control, 454 U.S. at 295. Second, the deference to legislative enactments recognized in Turner Broadcasting System, 114 S.Ct. at 2471, requires that courts ascertain that the legislative body "has drawn reasonable inferences based on substantial evidence."

There is simply no evidence in the record identifying the source of Proposition A, whether it was an individual or group,[16] the process of its development, nor the reasons for the particular dollar limits.[17] Further, there is no evidence of the details of the campaign waged in support of the initiative. There is, simply put, a failure of proof as to any of the facts Turner Broadcasting System would require that we consider to justify according deference.

Whether the deference Turner Broadcasting System requires for acts of Congress extends to the acts of the state legislative body is an issue not before us to decide. Legislative bodies consist of elected representatives shown to be bound by the United States Constitution, and their legislative product is subject to veto by the elected executive, either President or Governor. The process of enactment, while perhaps not always perfect, includes deliberation and an opportunity for compromise and

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[16] Only the amicus briefs identify the sponsors and participants in the initiative campaign for Proposition A. These include Missourians for Campaign Finance Reform, a coalition composed of the Missouri Public Interest Research Group, ACORN, the Missouri League of Women Voters, and United We Stand - Missouri.

[17] Proposition A differs from the initiative procedures in some states, which either require or permit the ballot materials describing the proposition to include a statement of the purposes and reasons for the enactment. There was no such statement with respect to Proposition A.

amendment,[18] and usually committee studies and hearings. These are substantial reasons for according deference to legislative enactments that do not exist with respect to proposals adopted by initiative. On the evidentiary showing before us, there is no justification to accord Proposition A the deference that Turner Broadcasting System requires for congressional action. See Xniquez v. Arizonans for Official English, Nos. 92-17087, 93-15061, 93-15719, 1995 WL 583414, at *21 (9th Cir. Oct. 5, 1995) (en banc) (noting ballot initiative lacked legislative findings and was not subject to extensive hearings or analysis).

V.

In conclusion, we hold that the campaign contribution limits in Proposition A, Mo. Ann. Stat. § 130.100, are not narrowly tailored to meet the compelling state interest of limiting the influence of corruption associated with large campaign contributions, and is, therefore, unconstitutional. We reverse the decision of the district court and remand the case to the district court for the entry of judgment permanently enjoining the State and the Missouri Ethics Commission from implementing, enforcing, or acting in reliance upon section 130.100.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS,
EIGHTH CIRCUIT.

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[18] Indeed the process of enactment of Senate Bill 650 demonstrates the back and forth action of both the House and the Senate, and considerable effort to achieve a conference substitute agreeable to both bodies.

IN THE UNITED STATES DISTRICT COURT FOR
THE WESTERN DISTRICT OF MISSOURI
SOUTHERN DIVISION

| | | |
|---|---|---|
| THOMAS D. CARVER, | ) | |
| | ) | |
| Plaintiff, | ) | |
| | ) | |
| vs. | ) | No. 94-3505-CV-S-4 |
| | ) | |
| JEREMIAH W. NIXON, et al., | ) | |
| | ) | |
| Defendants. | ) | |

ORDER

The matter before the Court is a request to issue a decision granting a permanent injunction enjoining the enforcement of Proposition A, §130.100 RSMo 1994 and declaring the new law unconstitutional.

Plaintiff Thomas Carver filed a civil rights suit for declatory and injunctive relief pursuant to 42 U.S.C. §1983 and 28 U.S.C. §§2201 and 2202 to enjoin defendants from enforcing Missouri Statute Section 130.100 otherwise known as "Proposition A." On December 28, 1994, this Court granted plaintiff's motion for a temporary restraining order and ordered the parties to file suggestions concerning whether the injunction should become permanent. On January 26, 1995, the temporary restraining order became a preliminary injunction and the Court ordered the parties to inform the Court whether they would request an evidentiary hearing in the case. On February 3, 1995, plaintiff requested an evidentiary hearing which was held

on March 31, 1995. The parties filed written suggestions in support of an in opposition to a permanent injunction. For the following reasons, the Court will not issue a permanent injunction in this case.

Statement of Facts

Missouri voters passed an initiative called Proposition A on November 8, 1994. Proposition A included Section 130.100 which provides:

> 130.100. Contribution Limits: There shall be the following limitations on campaign contributions:
>
> (1) No person or committee shall make a contribution to any one candidate or candidate committee with an aggregate value in excess of:
>
> (a) $100 per election cycle per candidate in districts with fewer than 100,000 residents;
>
> (2)[sic] $200 per election cycle per candidate, other than statewide candidates, in districts of 100,000 or more residents. For purposes of this section, "statewide candidates" refers to those candidates seeking election to the office of Governor, Lieutenant Governor, Attorney General, Auditor, Treasurer, and Secretary of State.

> (3)[sic] $300 per election cycle per statewide candidate.
>
> (2) No person, entity or committee shall make a contribution to any other person, entities or committees for the purpose of contributing to a specific candidate which when added together or when added together with contributions made directly to the candidate or to the candidate's committee, will have an aggregate value in excess of the limits stated in section 1.

Missouri Revised Statute Section 130.011(16) defines an election cycle as "the period of time from general election for an office until the next general election for the same office."

Issue

The sole issue in this case is whether the limits on campaign contributions set in Proposition A are too low as to be deemed an unconstitutional restriction on plaintiff's right to political expression and association under the First Amendment.

Plaintiff's Argument

Plaintiff challenges the constitutionality of the provision of Proposition A limiting campaign contributions. Plaintiff asserts that the restriction on his ability to make contributions to candidates in excess of aggregate limits per election cycle infringe upon his rights to free speech and association. Plaintiff claims the contribution limits under Proposition A are low enough as to be an unconstitutional interference with his ability to support candidates and to

communicate with potential supporters for fundraising purposes. Plaintiff further argues candidates today must buy expensive time and space in print and electronic media in order to successfully campaign because these are the two major effective forms of campaigning. He argues the contribution limits will inhibit the candidates' ability to communicate their political stances and goals to the voters.

Plaintiff contends incumbents have an advantage in fundraising due to their name recognition and their already existing supporters. Plaintiff is concerned it will be particularly difficult for challengers to raise the funds needed to successfully mount a campaign against incumbents given the contribution limits and the cost involved in purchasing effective advertising. Wealthy candidates would also have an advantage over the less wealthy who would need to spend a significant amount of time seeking contributions.

Plaintiff argues the law is not narrowly tailored to meet the state's interest of avoiding corruption or the appearance of corruption. Specifically, plaintiff argues the law will not prevent wealthy special interests from fighting against the candidates who oppose them. Proposition A does not address or limit independent expenditures or indirect contributions to a campaign. Indirect contributions include actions such as corporations giving employees a leave of absence in order that they may work as campaign volunteers or contributors spending personal funds to promote the candidate without donating directly into the candidate's political fund. Plaintiff argues because Proposition A does not comprehensively attack all of the ways people and special interest groups may purchase influence with elected officials, the Court should enjoin enforcement of the law and declare it unconstitutional.

Discussion

The case setting forth the general principles to be applied in determining the constitutionality of efforts at campaign finance reform is Buckley v. Valeo, 424 U.S. 1 (1976), 46 L.Ed.2d 659, 96 S.Ct. 1089 (1976). In Buckley the Supreme Court considered the constitutionality of several provisions of the Federal Election Campaign Act of 1971 (FECA). FECA limits campaign contributions in federal elections to $1,000 per individual contributor or group and to $5,000 per political committee for any single candidate per election. 424 U.S. at 7.

In Buckley the Supreme Court found two constitutional protections as to be implicated by campaign finance reform: political expression and association. The Court recognized that a major purpose of the First Amendment is to protect political speech. "Discussion of public issues and debate on the qualifications of candidates are integral to the operation of the system of government established by our Constitution." Buckley, 424 U.S. at 14. However, the importance of political debate does not preclude all limitations on either freedom of association or freedom of speech in the political context. "Neither the right to associate nor the right to participate in political activities is absolute." Id. at 25 (quoting CSC v. Letter Carriers, 413 U.S. 548, 567, 93 S.Ct. 2880, 37 L.Ed.2d 796 (1973)). Limitations on these rights are permissible where a compelling state interest is served, if the limitations imposed are narrowly tailored to serve that interest. Buckley, 424 U.S. at 25; see Austin v. Michigan Chamber of Commerce, 494 U.S. 652 (1990). Thus, even a significant interference with protected rights of political association may be sustained so long as the state demonstrates a sufficiently important interest and employs means closely drawn to avoid unnecessary abridgement of

First Amendment rights to association. Buckley, 424 U.S. at 25.

The Supreme Court in Buckley recognized that governments have a compelling interest in preventing corruption and the appearance of corruption in the electoral system that may result from the flow of large amounts of money from individual contributors to candidates. Id. at 25-27. In its analysis, the Supreme Court did not find it necessary to look beyond the Act's primary purpose of limiting the actuality and appearance of corruption in order to find a constitutionality sufficient justification for the contribution limitations. Id. at 26. Under Buckley, Missouri clearly has a compelling state interest in limiting campaign contributions.

The other applicable case is Day v. Holahan, 34 F.3d 1356 (8th Cir. 1994). In Day, the Eighth Circuit reviewed the constitutionality of Minnesota's campaign finance reform laws. The provision plaintiff argues is applicable to this case concerns limits put on contributions to and from political committees. The Eighth Circuit held that the $100 limit was so low as to infringe upon citizens' First Amendment right to political association and free political expression. Id. at 1365-66. The language of the Minnesota statute concerning contribution limits that was at issue is as follows:

> Subd. 12 Contributions to other political committees or funds. The treasurer of a political committee or political fund, other than a candidate's principal campaign committee or a political party unit as defined in section 10A.275, shall not permit the political committee or political fund to accept aggregate contributions from an

> individual, political committee, or political fund in an amount more than $100 a year.

The Minnesota statute differs from Proposition A in that it regulates contributions to independent committees and not direct contributions to individual candidates and their campaign committees. The court of appeals held that because the limit applies to contributions both by and to political committees and funds, the limit affects free association as well as free speech. Id. at 1365. The court held an annual $100 limit on contributions to or by political funds and committees is too low to allow meaningful participation in protected political speech and association and, thus, is not narrowly tailored to serve the state's legitimate interest in protecting the integrity of the political system.

The Day case is only applicable to this case under very narrow circumstances. Under Proposition A, there are no limits being made on contributions to or by political committees unless the purpose is to contribute to a specific candidate and when the contributions by themselves or when added together with contributions made directly to the candidate or to the candidate's committee will have an aggregate value in excess of the stated limits. Proposition A, 130.100(2). The limits in Proposition A restrict the amounts persons or committees may contribute to a candidate or a candidate committee. Under Buckley, some limits on the amount of contributions made by persons or committees to candidates and their campaign committees are constitutional. The remaining questions in the analysis is whether the limits imposed by Proposition A are so low as to be an unconstitutional restriction of First Amendment rights of speech and association.

The Court must determine whether Proposition A's campaign contribution limits are sufficiently tailored to meet the state's goal of maintaining the appearance of political integrity in the system without violating constitutional guarantees. This question addresses plaintiff's first argument that the dollar limits are too low. Experts at the hearing indicated they agreed with the Court that what determines the constitutionality of the limits is the dollar amount of the limits. The Supreme Court held in Buckley that a $1,000 limit on contributions to a candidate for a federal office such as the U.S. Senate is a constitutional limit. Here the limits are lower, however they are incremental according to the size of the district and voting population and the type of office being sought. Logically, in districts with a lower population, candidates have a smaller area in which they must campaign and fewer voters with whom they must communicate. Proposition A's limits are higher for contributions made to statewide candidates but the risk of garnering influence is lessened by the fact that there will be a larger number of contributors in those races. Further, the higher limits will help the candidates campaign in the larger geographical area of the entire state. The stairstepping of the contribution limits demonstrates a more narrow tailoring of Proposition A to fit the state's goal.

In this case, an overwhelming 74 percent of the voters of Missouri determined that contribution limits are necessary to combat corruption and the appearance thereof. The voters, through the referendum process, set the contribution limits. This is an indication of the sentiment of the voters of Missouri as to what the limits should be in order for them to feel that the state is helping stop corruption of the appearance thereof. In Buckley, the Supreme Court declined to analyze what contribution limits would better serve government's interest, however the Court

suggested that if a plaintiff could come forward with substantial evidence that the limits were so low as to prevent candidates from "amassing the resources necessary for effective advocacy", then the candidate would have raised a cognizable claim. Buckley, 424 U.S. at 21. At the hearing, there was no indication that the contribution limitations imposed by Proposition A would have any dramatic adverse effect on the funding of campaigns and the ability of candidates to communicate to the voters.

At trial, there was evidence of the fact that in recent years, a significant number of states have imposed campaign contribution limits. Currently, at least 27 states in addition to the federal government have imposed such limits. A number of candidates have voluntarily limited the size of contributions they would accept for the purpose of assuring voters that they will not be unduly influenced by wealthier donors if voted into office. These mandatory and voluntary limits reflect the belief that steps must be taken to curb the effect of money on politics and to promote the compelling interest of impartiality in politics. Clearly, the voters of Missouri agree that the limits are an important step in promoting a compelling governmental interest in increasing the voters' trust of democratic institutions.

Plaintiff's second argument centers around plaintiff's concern that incumbents have an advantage in fundraising due to their name recognition and their already existing supporters. Plaintiff argues with the contribution limits, it will be difficult for challengers to raise the funds needed to defeat an incumbent. Further, wealthy candidates would have an advantage over the less wealthy.

It is true that incumbent candidates may often have more name recognition than challengers. However, no evidence was presented to the Court that given the limits on

campaign contributions for all candidates, challengers will not be able to raise the funds needed to launch a successful campaign. In the hearing before the Court, expert testimony indicated that Proposition A does not favor incumbents and that many challengers welcome limits on contributions as a way to stop incumbents from accepting large contributions. There was testimony recounting recent political races when challengers defeated incumbents under both mandatory and voluntary campaign contribution limits. Expert testimony also revealed that with contribution limits a greater percentage of the population will contribute to campaign because people will feel that the candidates appreciate and are more responsive to the smaller contributors.

Plaintiff's last argument is that Proposition A is not narrowly tailored to meet the state's interest because it does not limit independent expenditures or indirect contributions made to a campaign nor does it limit the amount candidates themselves may contribute to their own campaigns. Plaintiff argues because Proposition A does not comprehensively attack all of the methods of garnering political influence, the Court should enjoin enforcement of the law and declare it unconstitutional.

The Court disagrees with plaintiff. Merely because Proposition A does not close all of the loopholes does not make its methods unconstitutional. Proposition A may not be worded as precisely as it could be in order to eliminate corruption, however, the law is tailored narrowly enough to help the state meet its goals of eliminating some means of corruption and of avoiding the appearance of corruption.

It is true that Proposition A does not limit the amount of personal funds a candidate may contribute to his or her own campaign and it does not limit contributions in

their own personal direct expenditures made in promotion of a candidate. These types of limits are not at issue in this case. However, the Court notes that such limits on the candidate and on contributors would directly restrict the candidate's and contributors' own political speech and would afoul of the protections of the First Amendment, while the limits on contributions at issue here only limit indirect speech of the contributor. Certainly, contributors are free to discuss candidates and issues without restriction. Plaintiff's concern that wealthy candidates may be able to direct more effective campaigns than candidates with less personal funds is a concern both before and after the enactment of Proposition A, however, no evidence was presented to the Court that this problem will be exacerbated if Proposition A is enacted. Again, just because Proposition A does not address all problems in the arena of campaigning does not make its provisions unconstitutional. The Court finds that given the state's goals and interest, Proposition A is a positive step towards the elimination of political corruption, even if it is not comprehensive in its approach.

Conclusion

The Court finds the contribution limits imposed by Proposition A are narrowly tailored to serve a compelling state interest and they do not unconstitutionally restrict plaintiff's First Amendment rights of free political speech and association.

Accordingly, it is hereby

ORDERED plaintiff's request for a decision granting a permanent injunction enjoining the enforcement of Proposition A, §130.100 RSMo 1994 and declaring the law unconstitutional is denied.

RUSSELL G. CLARK, SENIOR JUDGE
UNITED STATES DISTRICT COURT

Date: April 18, 1995

IN THE UNITED STATES DISTRICT COURT FOR
THE WESTERN DISTRICT OF MISSOURI
SOUTHERN DISTRICT

| | | |
|---|---|---|
| THOMAS D. CARVER, | ) | |
| | ) | |
| Plaintiff, | ) | |
| | ) | |
| vs. | ) | No. 94-3505-CV-S-4 |
| | ) | |
| JEREMIAH W. NIXON, et al., | ) | |
| | ) | |
| Defendants. | ) | |

**SUPPLEMENTAL ORDER**

The Court has denied plaintiff's request for a permanent injunction and the preliminary injunction is hereby quashed.

IT IS SO ORDERED.

RUSSELL G. CLARK, SENIOR JUDGE
UNITED STATES DISTRICT COURT

Date: April 18, 1995

Supreme Court, U.S.
FILED
MAR 8 1996
CLERK

No. 95-1258

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1995

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JEREMIAH W. (JAY) NIXON, Attorney General of Missouri,
and JOHN MAUPIN, Chairman, Missouri Ethics Commission, *Petitioners*,
v.
THOMAS D. CARVER, *Respondent*.

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On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Eighth Circuit

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# BRIEF IN OPPOSITION

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## QUESTION PRESENTED

In the November 1994 general election, Missouri voters approved an initiative, Proposition A, which set new campaign contribution limits for state and local candidates. These limits ranged from $300 per election cycle for statewide offices to $100 per election cycle for state representative seats and local offices in districts with populations less than 100,000. These limits replaced a higher set of limits passed by the state legislature earlier in 1994 as Senate Bill 650. Thomas Carver, a citizen of Missouri, challenged the constitutionality of the limits enacted by voter initiative in a 42 U.S.C. § 1983 civil rights suit.

The question presented by this suit is:

Whether the First Amendment freedoms of speech and association prohibit a State from enacting campaign contribution limits ranging from $100 to $300 per election cycle for state and local candidates that are dramatically lower than the $1000 per election limit approved by this Court in *Buckley v. Valeo*, 424 U.S. 1 (1976), for presidential and congressional candidates without the State demonstrating that it has narrowly tailored these lower limits to meet a compelling interest.

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1995

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JEREMIAH W. (JAY) NIXON, Attorney General of Missouri,
and JOHN MAUPIN, Chairman, Missouri Ethics Commission, *Petitioners,*
v.
THOMAS D. CARVER, *Respondent.*

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On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Eighth Circuit

---

## BRIEF IN OPPOSITION

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The respondent, Thomas Carver, respectfully requests that this Court deny the petition for writ of certiorari which seeks review of the Eighth Circuit's opinion in this case. That opinion is reported at 72 F.3d 633 (8th Cir. 1995). (Petitioner's Appendix [hereinafter Pet. App.] at A-1 to A-20.) The opinion of the district court is reported at 882 F. Supp. 901 (W.D. Mo. 1995). (Pet. App. at A-30 to A-42.)

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const., amend. I:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

Mo. Rev. Stat. § 130.100 (Supp. 1995) (part of "Proposition A"):

Contribution limits: There shall be the following limitations on campaign contributions:
(1) No person or committee shall make a contribution to any one candidate or candidate committee with an aggregate value in excess of:

(a) $100 per election cycle per candidate in districts with fewer than 100,000 residents;

(2) [b] $200 per election cycle per candidate, other than statewide candidates, in districts of 100,000 or more residents. For purposes of this section "statewide candidates" refers to those candidates seeking election to the office of Governor, Lieutenant Governor, Attorney General, Auditor, Treasurer and Secretary of State.

(3) [c] $300 per election cycle per statewide candidate.

(2) No person, entity or committee shall make a contribution to any other persons, entities or committees for the purpose of contributing to a specific candidate which when added together or when added together with contributions made directly to the candidate or to the candidate's committee, will have an

aggregate value in excess of the limits stated in section 1*.
(3) No candidate or candidate committee shall solicit or accept any contribution with an aggregate value in excess of the limits stated in this section.
(4) For purposes of this section, the term "candidate" shall include the candidate, the candidate's treasurer, and the candidate's committee and any contribution to the candidate's treasurer or candidate committee shall be deemed a contribution to the candidate.
(L. 1994 Adopted by Initiative, Proposition A, November 8, 1994)

*Probably refers to subdivision (1) of this section.

Mo. Rev. Stat. § 130.032.1 (1994) ("Senate Bill 650"):

1. In addition to the limitations imposed pursuant to sections 130.031 and 130.052, the amount of contributions made by or accepted from any person in any one election shall not exceed the following:

(1) To elect an individual to the office of governor, lieutenant governor, secretary of state, state treasurer, state auditor or attorney general, one thousand dollars;

(2) To elect an individual to the office of state senator, five hundred dollars;

(3) To elect an individual to the office of state representative, two hundred fifty dollars;

(4) To elect an individual to any other office, if the population of the electoral district, ward, or other unit according to the latest decennial census is under one hundred thousand, two hundred fifty dollars;

(5) To elect an individual to any other office, if the population of the electoral district, ward, or other unit

according to the latest decennial census is at least one hundred thousand but less than two hundred fifty thousand, five hundred dollars; and

(6) To elect an individual to any other office, if the population of the electoral district, ward, or other unit according to the latest decennial census is at least two hundred fifty thousand, one thousand dollars.

## STATEMENT OF THE CASE

Plaintiff Carver incorporates by reference the statement of facts in the opinion of the Eighth Circuit. (Pet. App. at A-2 to A-6.) Carver corrects Petitioner's Statement, (Petition for Writ of Certiorari [hereinafter Pet.] at 3-6), pursuant to the requirements of Supreme Court Rule 15.2.

A correct background statement would be that prior to 1994 there were no limits on campaign contributions to state and local candidates in Missouri. *See* Mo. Rev. Stat. Chapter 130 (1994). Candidates only had to file periodic campaign finance reports. Mo. Rev. Stat. § 130.041. The Missouri legislature passed contribution limits as part of Senate Bill 650 during its session that ended in May 1994. Mo. Rev. Stat. § 130.032 (1994). These limits were to go into effect on January 1, 1995. Mo. Rev. Stat. § 130.032.7. Voters, however, enacted dramatically lower contribution limits through the initiative process that concluded on election day, November 8, 1994. *See* Missouri Attorney General Opinion Letter No. 218-94 at 3 (December 6, 1994). The contribution limits of Proposition A (codified as Mo. Rev. Stat. § 130.100 (Supp. 1995)) went into effect immediately and superseded Senate Bill 650's limits (codified as Mo. Rev. Stat. § 130.032.1 (1994)) according to

the opinion of Attorney General Nixon. Missouri Attorney General Opinion Letter No. 218-94 at 5 (December 6, 1994).

In their Petition, defendants Nixon and Maupin ("the State") attributed the large vote for the initiative called "Proposition A" with its campaign contribution limits to "increasing public disillusionment" and "a new wave of reform efforts." (Pet. at 4.) The Petition did not cite to the record for these propositions.

There was nothing in the record to support the State's view of history. There was no polling data, surveys, or any other reliable data to support these statements. The Eighth Circuit commented on the lack of evidence about the purpose of the Proposition A campaign contribution limits, or the reasons why people voted for them. (Pet. App. at A-28.)

Petitioners' Statement does not give any background about Tom Carver. Carver is a resident of Springfield, Missouri, who has taken the responsibilities of citizenship seriously. (Trial Transcript [hereinafter Tr.] at 6, 8.) He was on the steering committee for Missourians for Honest Elections who worked for campaign finance reform in Missouri after Watergate in the 1970's. (Tr. at 8.) He served two two-year terms in the Missouri House of Representatives. (Tr. at 7-8.) He has contributed to political candidates. (Tr. at 4.) He has advised and managed campaigns. (Tr. at 27.) He and his wife have hosted fundraisers for candidates in their home. (Tr. at 5.) He has contributed to candidates for the purposes of "nurtur[ing] the political process," "help[ing] people participate in that process," "further[ing] my own opinions about good government," and "counterbalanc[ing] to a lot of institutional funding." (Tr. at 6.)

## REASONS WHY THE PETITION SHOULD BE DENIED

**I. This Court has an inadequate record below to issue an advisory opinion as requested by the State on the constitutionality of campaign contribution limits that were dramatically lower than the $1000 per election limit approved in *Buckley v. Valeo*, 424 U.S. 1 (1976), because the State failed to present evidence that the $100-$300 per election cycle contribution limits in Proposition A were narrowly tailored to meet any compelling interest.**

It is hard to analyze a remedy without knowing what the problem is. Nevertheless, the State has petitioned this Court to consider the constitutionality of campaign contribution limits without the State making any

> "showing as to why it was necessary to adopt the lowest contribution limits in the nation and restrict First Amendment rights of so many contributors in order to prevent corruption of the appearance of corruption associated with large campaign contributions."

(Pet. App. at A-26.) The State also failed to present "any evidence of a harm or disease that needed to be addressed between the limits of Senate Bill 650 and those enacted in Proposition A." (Pet. App. at A-24.) The State, therefore, failed to meet its burden to show that the Proposition A contribution limits were narrowly tailored to meet a compelling interest. *McIntyre v. Ohio Elections Commission,* 115 S.Ct. 1511, 1519 (1995). Without this evidence, this Court cannot analyze whether these low contribution limits were narrowly tailored to the perceived problem the State wants this Court to address.

The State has petitioned this Court to issue an advisory opinion on the constitutionality of limits in the $100 to $300 per election cycle range on contributions to candidates for state and local offices in Missouri. The Eighth Circuit reviewed the contribution limits in light of the State's compelling interest in "limiting the reality or perception of undue influence and corruption from large contributions." (Pet. App. at A-15.) The Eighth Circuit correctly reasoned that the contribution limits in Senate Bill 650 solved any problems caused by large campaign contributions. (Pet. App. at A-24.)

Senate Bill 650's limits range from $1000 per election for statewide candidates to $250 per election for the office of state representative or for offices in a district with a population under 100,000. Mo. Rev. Stat. § 130.032.1. These limits include $500 on contributions to candidates for the state senate and for offices in districts with a population of more than 100,000 but less than 250,000. *Id.*

It was reasonable to expect the State to produce evidence of whatever problems would have arisen from contributions above the Proposition A limits. The State could have presented testimony, if any existed, from the Missouri Ethics Commission about problems of corruption arising from contributions. The State's expert witnesses on campaign finance laws were unable to provide the district court with any examples of corruption in Missouri or other states arising from contributions under $1000. (Tr. at 82-85.)

Consequently, the decision of the Eighth Circuit will not foreclose courts from litigating the constitutionality of contribution limits that are lower than the $1000 per election limit approved for individuals in *Buckley*. The State's petition cited a District of Columbia case, *National Black Police Ass'n*

*v. District of Columbia Board of Elections and Ethics*, 858 F. Supp. 257 (D.C.C. 1994) (order denying plaintiff's motion for preliminary injunction). (Pet. at 9, n.22.) The court heard closing arguments in that case on February 29, 1996. *National Black Police Ass'n v. District of Columbia Board of Elections and Ethics*, No. 94-1476 (telephone call to Ross, Dixon & Masback at 202-662-2017). If *Carver v. Nixon* had foreclosed the First Amendment issues, there would not have been a trial.

Although the State predicts that litigation on individual campaign contribution limits may start in other jurisdictions, (Pet. at 15-16), there has been a noticeable lack of litigation on individual contribution limits since *Buckley*. For example, there are no appellate decisions on challenges to the limits for federal candidates as predicted by the State's petition even though inflation has effectively lowered the $1000 per election limit since Congress set that limit in 1974. Neither Carver nor any other resident of Missouri has challenged the limits enacted by the Missouri legislature in Senate Bill 650 as Mo. Rev. Stat. § 130.032.1.

The future harm that the State predicts in support of its petition, (Pet. at 9), will not occur. Missourians cannot "hand over large amounts of money to candidates themselves," (Pet. at 9), because Missouri has the contribution limits of Senate Bill 650 in effect upon the demise of Proposition A. This case was not a choice between no contribution limits (Missouri prior to November 8, 1994) and the extremely low limits of Proposition A because the reasonable limits in Mo. Rev. Stat. § 130.032.1 have been in effect since January 1, 1995, except for the time between the judgment of the district court on April 18, 1995, (Pet. App. at A-42), and the mandate from the Eighth Circuit issued on January 25, 1996.

There is also no record in support of the State's argument that the Proposition A initiative for contribution limits "was part of a widespread, grassroots fight" for what voters considered to be a "critical need." (Pet. at 10.) The Eighth Circuit correctly noted that the district court record did not present any evidence about the need for the limits or the purposes and intentions to the voters who supported Proposition A. (Pet. App. at A-26, A-28.) The proponents and voters for Proposition A may have supported the initiative to sabotage Missouri's system of private campaign financing and force the legislature to approve public financing for state and local offices.

The State cannot fulfill its burden by conjecturing about problems in the election process and offering a vague hypothesis that its regulations will promote the public good. (*Amicus curiae* American Civil Liberties Union Brief in Support of Appellant at 7.) The State "must demonstrate that the recited harms are real ... and that the regulation will in fact alleviate these harms in a direct and material way." *United States v. National Treasury Employees Union,* 513 U.S. __, 115 S.Ct. 1003, 1017 (1995) (quoting *Turner Broadcasting System, Inc. v. FCC,* 512 U.S. __, __, 114 S.Ct. 2445, 2470 (1994)).

The lack of litigation over the past twenty years since *Buckley* shows that there is no need for guidance from this Court on the constitutionality of campaign contributions by individuals to candidates. If that need ever arises, it will arise out of a trial court record that demonstrates a compelling need for contribution limits below what *Buckley* upheld for federal candidates. With that kind of record, this Court would be able to determine whether the remedy of low contribution limits was narrowly tailored to meet whatever purported compelling need exists.

In the meantime, nothing in the Eighth Circuit's decision will prevent officeholders and candidates from debating campaign finance issues. Candidates can voluntarily abide by the contribution limits in Proposition A.

**II. Missouri's campaign contribution limits in Proposition A were the lowest in the United States and not typical of the limits in effect elsewhere.**

The Eighth Circuit's decision noted that the campaign contribution limits in Proposition A were lower than the limits in any other state and "dramatically lower" than the limits approved in *Buckley*. (Pet. App. at A-21 to A-22.) This Court should deny the Petition for Writ of Certiorari because the extremely low limits are not typical of the limits that the State predicts will become a constitutional issue elsewhere. It is unlikely that this Court would reach the issue on which the petition seeks an advisory opinion.

The numbers for contribution limits in the State's Petition do not tell the whole story. The rest of the story depends, in part, on the time period for the contribution. The Eighth Circuit carefully analyzed the different contribution limits among the states. (Pet. App. at A-20 to A-21.) The court carefully distinguished "per election cycle" limits from "per election" limits. (Pet. App. at A-20.)

Proposition A's contribution limits were "per election cycle." Mo. Rev. Stat. § 130.100 (Supp. 1995). Missouri's Campaign Finance Disclosure Law, Chapter 130, defines "election cycle" as "the period of time from general election for an office until the next general election for the same office. Mo. Rev. Stat. § 130.011(16) (1994).

The *Buckley* limits were per election. 424 U.S. at 23. Therefore the maximum contribution for a federal candidate was a total of $2000 but no more than $1000 in each primary or general election (assuming no run off election). 424 U.S. at 24. Proposition A limited the maximum contribution to a statewide candidate to a total of $300 for the primary and general elections. Mo Rev. Stat. § 130.100(1)(c). The relevant comparison is between Proposition A's $300 limit and *Buckley*'s $2000 limit.

Another way to structure contribution limits is to limit the contributions annually as Minnesota did in *Day v. Holahan*, 34 F.3d 1356 (8th Cir. 1994). The contribution limit at issue in *Day* was $100 per year on contributions to political committees or funds other than candidate committees. *Id.* at 1365. If considered annually, the maximum Proposition A contribution would be $75 per year because statewide candidates in Missouri serve four-year terms. *See* Mo. Const. Art. IV, § 17.

The numbers comparing contribution limits in different states and cities also do not tell us whether the areas provide public financing. Jon Hutchens, a polling and media consultant who was an expert witness for Carver, testified that some states with contribution limits provided public financing. (Tr. at 88.)

The State predicts constitutional challenges to contribution limits in "31 states and many more cities." (Pet. at 15-16.) The State's Petition implies that someone will challenge the Federal Election Campaign Act's $1000 limit at issue in *Buckley* because inflation has eroded its value. (Pet. at 15.) The rate of inflation was much greater in the late 1970's. Where are those suits?

*Buckley* has given states and cities all the guidance they

need to set constitutional limits. After reviewing the trial record, the Eighth Circuit could not find any evidence that the extremely low limits in Proposition A were necessary. (Pet. App. at A-22.) The lack of challenges to contribution limits like those in Senate Bill 650 show that the limits in Proposition A (Section 130.100) were not typical. This Court should deny the State's petition for certiorari because conflicts may never arise between the circuits over the constitutionality of candidate contribution limits.

**III. There are no uncertainties and conflicts on the constitutionality of Proposition A's contribution limits that this Court could resolve by granting the petition for certiorari.**

The lack of court challenges to candidate contribution limits since *Buckley* shows that there are no uncertainty and conflict over the constitutionality of contribution limits. The State has implied in part III.A. of its petition that the Eighth Circuit's decision will undermine citizens' confidence in elections. (Pet. at A-16.) The Eighth Circuit's decision has, in fact, promoted the integrity of the political process by preserving the benefits of campaign finance reporting laws in effect in Missouri since 1978. *See* Rev. Stat. Mo. Chapter 130 (Campaign Finance Disclosure Law).

If the Proposition A limits had been upheld, there would have been a rush to form so-called independent campaign committees for the purposes of raising and expending money during the 1996 elections. The State's expert witness, Robert Stern, testified that low contribution limits cause an increase in independent expenditures. (Tr. at 150.) Expenditures by independent campaign committees present a problem because

independent committees only file quarterly reports. Mo. Rev. Stat. § 130.046.3. Candidates report their contributions and expenditures before and after elections. Mo. Rev. Stat. § 130.046.1.

A citizen, candidate, or reporter who wants to know who is contributing and spending money in an election would have to review the reports of all the committees at the office of the county clerk, board of election commissioners, or the Missouri Ethics Commission. *See* Mo. Rev. Stat. § 130.026. The independent committees have names such as the Citizens for Open and Honest Government. (Tr. at 105.)

These names cause the oversight problem of soft money. Because soft money is not reported as contributions to or expenditures by a candidate, it is difficult to track. Missouri's laws on campaign finance reporting will work as designed to give citizens the information about contribution and expenditures if the contribution limits are reasonable so there is less incentive to form independent committees.

The State's argument in III.B. of its petition, (Pet. at 17), demonstrates the problem caused by independent committees. The State argues that the contribution limits do not restrict Carver's freedom of speech because he is free to make independent expenditures in support of candidates. (Pet. at 19.) The State cannot have it both ways. If the contribution limits merely rechannel Carver's money in other directions, the limits do not serve any compelling interest associated with too much money in campaigns. The State's argument shows there was no compelling need for restricting Carver's freedom of speech in the first place.

The State argues that Carver is able to speak through the

media and other means to communicate his support for a candidate. (Pet. at 19.) Speaking through the media costs money. (Tr. at 34, 91.) Carver is not millionaire publisher Steve Forbes. Speaking through the media involves sophisticated production of radio and television spots before a station will accept an advertisement. The State has violated Carver's freedom of political association by preventing him from associating with other contributors to raise sufficient funds for a candidate to purchase television time.

Carver's expert witnesses, two veteran campaign professionals, discussed the importance of television for candidates because it is the cheapest (per voter contact) and most effective way to communicate with voters. (Tr. at 82-88.) One expert, Joe Cowart, discussed the problems with campaigns that relied on billboards, (Tr. at 33), candidate handshaking, (Tr. at 45), volunteers, (Tr. at 33-36), bumper stickers, (Tr. at 39), yard signs, (Tr. at 38), volunteer phone banks, (Tr. at 37-38), direct mail, (Tr. at 39-42), emery boards, (Tr. at 38), and literature drops, (Tr. at 42), instead of polling and television. Not even the Fuller Brush salesperson goes door-to-door anymore.

A citizen's First Amendment freedoms include making contributions to candidates. *Buckley,* 424 U.S. 1, 14-29; *accord Citizens Against Rent Control v. Berkeley,* 454 U.S. 290, 298 (1981). Because the media makes candidates buy advertizing time, money is an integral part of political speech. The contribution limits, therefore, limit core First Amendment activities, political expression and association, which are essential for a meaningful campaign.

The contribution limits, Section 130.100 in Proposition A, are not content neutral because they only limit contributions to

political candidates. The State, however, argues for minimal constitutional scrutiny as if these contribution limits were merely "economic regulation." (Pet. at 22.) There is nothing in the record of the district court to establish a compelling interest sufficient to support such a radical departure from *Buckley* and other First Amendment decisions.

In part III.C. of its petition, the State wants this Court to consider whether a lower level of scrutiny is appropriate for limits on campaign contributions by individuals. (Pet. at 22.) Here again, the State is seeking an advisory opinion on the appropriate remedy without presenting evidence of a problem. This Court could not apply the rational relationship test to the Proposition A contribution limits as suggested by the State because, as the Eighth Circuit noted, the district court record contains no evidence of the purpose for the limits. (Pet. App. at A-28.)

In its petition for writ of certiorari, the State could not provide this Court with any conflicts of decisions over the constitutionality of campaign contribution limits to candidates. (Pet. at 22-25.) The lack of conflicts shows there is no need to grant the State's petition for certiorari.

**IV. The Eighth Circuit's decision will not be an obstacle to campaign finance reform efforts.**

The Eighth Circuit's decision does not prevent state and local governments from enacting appropriate contribution limits to remedy problems of corruption caused by campaign contributions. The Eighth Circuit's decision did not establish a new rule of law by holding that the Proposition A contribution limits violated the First Amendment. The decision followed basic First Amendment jurisprudence by declaring the

limits unconstituional because the State failed to present any evidence of a compelling need for such low limits to prevent the potential for corruption caused by large contributions. (Pet. App. at A-26.)

The Eighth Circuit found the contribution limits unconstitutional because of the deficient record in the district court. (Pet. App. at A-27, A-29.) The decision did not decide whether these contribution limits were unconstitutional on their face values.

The Eighth Circuit's decision leaves another issue unresolved--whether a state or local government violates the First Amendment by enacting extremely low contribution limits if the government narrowly tailors those limits to meet a compelling need caused by problems with small campaign contributions to candidates. Granting certiorari will not resolve this issue because the district court record showed no evidence of any problem or harm caused by contributions below the limits already established by Mo. Rev. Stat. § 130.032.1 (Senate Bill 650).

The Eighth Circuit responsibly and thoughtfully fulfilled the role of the judicial branch in checking actions by other branches of government that violated core First Amendment freedoms of political expression and association. There was no reason for the Eighth Circuit to uphold the constitutionality of contribution limits merely because they passed with seventy-four percent of the vote in the initiative process. Legislators, unlike voters, take an oath to uphold the Constitution of the United States. *See* U.S. Const. Art. V, cl.3; Mo. Const. Art. 3, § 15. The Eighth Circuit applied the rule that "voters may no more violate the Constitution than the legislature." (Pet. App. at A-27, citing *Citizens Against Rent Control v. Berkeley,* 454

U.S. 290, 295.)

The Eighth Circuit's decision is no obstacle to other methods of campaign finance reform. Money plays a critical role in political campaigns because television, radio, and newspapers offer limited coverage of political races and charge candidates who want to advertise. If the media provided free access to candidates, the candidates would not need to devote so much of their campaign efforts to raising money. Unlike contribution limits, this reform would not present First Amendment problems.

## CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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In the

# Supreme Court of the United States

October Term, 1996

JEREMIAH W. (JAY) NIXON, ATTORNEY GENERAL OF MISSOURI, AND JOHN MAUPIN, CHAIRMAN, MISSOURI ETHICS COMMISSION,

*Petitioners,*

v.

THOMAS D. CARVER,

*Respondent.*

**On Petition For Writ of Certiorari To the United States Court of Appeals For the Eighth Circuit**

## BRIEF OF THE STATES OF KENTUCKY, CONNECTICUT, FLORIDA, MINNESOTA, MONTANA, NEW MEXICO, OREGON, TENNESSEE, WEST VIRGINIA, THE CITY OF SAN DIEGO, CALIFORNIA AND THE DISTRICT OF COLUMBIA AS AMICI CURIAE IN SUPPORT OF PETITIONERS

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No. 95-1258

In the

# Supreme Court of the United States

October Term, 1996

JEREMIAH W. (JAY) NIXON, ATTORNEY GENERAL OF MISSOURI, AND JOHN MAUPIN, CHAIRMAN, MISSOURI ETHICS COMMISSION,

*Petitioners,*

v.

THOMAS D. CARVER,

*Respondent.*

On Petition For Writ of Certiorari
To the United States Court of Appeals
For the Eighth Circuit

## BRIEF OF THE STATES OF KENTUCKY, CONNECTICUT, FLORIDA, MINNESOTA, NEW MEXICO, OREGON, TENNESSEE, WEST VIRGINIA, THE CITY OF SAN DIEGO, CALIFORNIA, AND THE DISTRICT OF COLUMBIA AS AMICI CURIAE IN SUPPORT OF PETITIONERS

## INTEREST OF THE AMICI CURIAE

By approving limitations on the size of campaign contributions to candidates for public office, *Buckley v. Valeo*[1] provided an essential means of combating the appearance and reality of political corruption, and restoring voter confidence in the political process. A majority of the States and many local governments have now embraced contribution limits as an integral part of a legislative framework designed to decrease the corrosive influence of money on the process of electing public officials.[2]

In Kentucky, for example, the legislative framework regulating campaign finance was enacted in the

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[1]424 U.S. 1 (1976).

[2]Eighteen cities and states have adopted contribution limitations lower than the $1,000 per election ($2,000 per election cycle) expressly approved in *Buckley*. See, Appendix A, *infra*. Under the Eighth Circuit's requirement that the $1,000 limitation approved in *Buckley* must be discounted for 22 years' inflation, the Eighth Circuit opinion also jeopardizes the contribution limitations in the 25 cities and states who have limitations of $1,000 per election or $2,000 per election cycle. See, Appendix B, *infra*.. Indeed, discounting the $1,000 contribution limitation to 1974 dollars jeopardizes several state and local limitations which do not greatly exceed $1,000 per election. See, Appendix C, *infra*. Finally, the trend is for states and cities to adopt smaller contribution limitations to remedy the public's perception that money speaks louder than ideas in American politics. See, CAMPAIGN FINANCE UPDATE: LEGISLATION AND LITIGATION IN THE 50 STATES, THE DISTRICT OF COLUMBIA AND THE FEDERAL GOVERNMENT, Counsel of Governmental Ethics Laws (1995). Accordingly, the Eighth Circuit opinion affects those states whose current contribution limitations may not be jeopardized, but whose power to enact further remedial legislation is jeopardized by that decision. *See*, Appendix D., *infra*.

wake of an FBI sting operation in which public officials had been sentenced to prison for selling their influence for far less than $1,000 -- the culmination of an era in which money has greatly influenced Kentucky politics.[3]

As occurred with Missouri's campaign finance reforms, Kentucky's reforms immediately produced litigation. Indeed Kentucky's campaign finance reform legislation faced no less than four constitutional challenges.[4]

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[3]Miller, KENTUCKY POLITICS AND GOVERNMENT, 197-215 (Univ. Nebraska Press 1994). The Kentucky legislation limits to $500 the amount which an individual or a registered committee may contribute to a candidate in an election, which is $1,000 for the primary and general election cycle. KRS 121.150(6). Kentucky also enacted a system of public financing for its gubernatorial elections. KRS 121S.020 et. seq.

[4]In *Kentucky Right to Life, et al. v. Nicholas King, et al.*, Case No. 3:95CV-582-H (W.D. KY. 1995) (unpublished opinion), appeal pending, No. 95-6581 (6th Cir.), the District Court upheld Kentucky's $500 limit as narrowly tailored to the Commonwealth's compelling interests in preventing corruption and its appearance. In its brief to the Sixth Circuit, appellant Kentucky Right to Life relies heavily upon the Eighth Circuit's opinion in this case. In *Gable, et al. v. Jones, et al.*, Civil Action No. 95-12, (E.D.Ky.) (unpublished partial opinion) the court upheld most of Kentucky's reforms, including the requirement that privately financed candidates make contributions of their own resources at least 30 days prior to the election in order to preserve the efficacy of publicly financed candidates' correlative release from the voluntary spending limit. In *Wilkinson v. Jones*, 876 F. Supp. 916, 929 (W.D.Ky. 1995), the court also upheld most of the challenged provisions, including the $50,000 limitation on loans by candidates to their campaign committees. In *Galbraith, et al. v. Gorman, et al.*, Civil Action No. 94-CI-1731, (Franklin Circuit Court, February 6, 1995), the court invalidated Kentucky's $100 limit on contributions to privately financed gubernatorial candidates as violative of the Equal Protection clause because publicly financed candidates were permitted to accept

Other states and cities enacting similar reform legislation will likely face similar litigation, especially if the Eighth Circuit's misinterpretation of *Buckley* is allowed to stand. If certiorari is not granted by this Court, the Eighth Circuit opinion will create uncertainty for any State legislature or city council considering reduced contribution limits as a remedy to the perception that special interest money controls American politics. It would also greatly assist the courts in determining the constitutionality of reduced contribution limitations if this Court granted certiorari in this case to resolve these issues.

## SUMMARY OF ARGUMENT

The Eighth Circuit's decision threatens the contribution limits chosen by several State and local governments and, therefore, threatens to destroy their carefully calibrated legislative remedies designed to combat political corruption in their elections and to restore their electorates' confidence in those elections.[5]

The Eighth Circuit's insistence that *Buckley* permits limits only on "large" contributions ignores the distinctions between nationwide, statewide and local elections, and ignores the efforts made by states such as Missouri to tailor their limits to the relative size of the relevant constituency. The Eighth Circuit's analysis also ignores the reality that local legislators are better situated to determine the *quid pro quo* threshold in their communities

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contributions in amounts up to $500.

[5] *See* footnote 2, *supra*.

than the federal courts, and threatens the ability of State and local governments to tailor the contribution limits to that threshold.[6]

In *Buckley*, this Court recognized that limitations on contributions only infringe speech indirectly because contributors may make unlimited independent expenditures. The Court therefore held that courts should defer to legislative decisionmaking in choosing from among various alternative contribution limitations.[7] The Eighth Circuit opinion nevertheless requires a legislature to justify its chosen limitation.[8] Consequently, the Eighth Circuit opinion sows confusion on these issues for both legislators and judges.

The Eighth Circuit's reliance on a mathematical comparison to the contribution limit upheld in *Buckley*,

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[6]For example, deference to the legislative choice of the Kentucky General Assembly in imposing a $500 contribution limit is particularly appropriate in light of the paltry sums of money that have wielded a corrupt influence in Kentucky politics in recent years--a political climate which recently culminated in the sentencing of a number of elected public officials to prison for selling their votes for amounts as low as $400. As Judge Heyburn noted in *Kentucky Right to Life, et al. v. Nicholas King, et al.*, Case No. 3:95CV-582-H, at 9 (W.D. KY.. 1992), appeal pending, No. 95-6581 (6th Cir.): "No one with a working knowledge of our recent political history can doubt that some limitation on contributions will contribute directly to reducing the perception of political corruption in Kentucky. ... Who should know better than the legislature what might wash the appearance of corruption from our politics?"

[7]424 U.S. at 30.

[8]*Carver v. Nixon*, 72 F.3d 633, 644 (8th Cir. 1995).

discounted for inflation, is also contrary to this Court's decision in *Buckley*. There is not yet a conflict in circuits in this precise point, because the Eighth Circuit's purely mathematical approach is unprecedented. However, there is a conflict in circuits on the controlling analytical framework, with the Eighth Circuit interpreting *Buckley* to require strict scrutiny and other circuits interpreting *Buckley* to apply a less rigorous standard to contribution limitations.[9]

The Eighth Circuit's decision will open the floodgates to litigation as campaign finance reforms are enacted in many States, cities and other local governments. This Court should therefore avail itself of the opportunity presented by this case to clearly state the level at which limits on contributions to candidates become unconstitutional, and by what criteria that level is to be determined.

## ARGUMENT

While *Buckley* inarguably sanctioned the imposition of limitations on contributions made directly to candidates by upholding the $1,000 limit at issue in that case, the *Buckley* decision did not provide a definitive means of evaluating contribution limits below that amount. In rejecting the argument that the $1,000 limit was too low, *Buckley* stated that:

> While the contribution limitation provisions might well have been structured to take

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[9] *See*, footnotes 19 and 21, *infra*, and accompanying text.

> account of the graduated expenditure limitations for House, Senate and Presidential campaigns, Congress' failure to engage in such fine tuning does not invalidate the legislation. As the Court of Appeals observed, "[i]f it is satisfied that some limit on contributions is necessary, a court has no scalpel to probe, whether, say, a $2,000 ceiling might not serve as well as $1,000." ... Such distinctions in degree become significant only when they can be said to amount to differences in kind.[10]

Subsequently, lower courts have struggled to define when a difference in degree becomes a difference in kind. In that quest, those courts must also discern from *Buckley* and its progeny the degree to which contribution limitations infringe upon freedom of speech, not just freedom of association; whether the infringement must withstand strict scrutiny or less rigorous analysis; the precise nature of the compelling state interest sufficient to withstand that scrutiny; and at what level the contribution limitation is sufficiently narrowly tailored in advancing that interest. The Eighth Circuit opinion illustrates the difficulty lower courts have had with these issues since *Buckley*. By granting certiorari in this case, the Court can give guidance on all these issues.

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[10] *Buckley*, 424 U.S. at 30.

## I. The Court Should Reaffirm That Contribution Limitations Only Infringe Speech Indirectly and Therefore Are Not Subject to Strict Scrutiny.

*Buckley* discussed the impact of contribution limits upon the first amendment rights of contributors primarily in terms of freedom of association. Because a contributor retains the right to make unlimited independent expenditures, *Buckley* held that "a limitation upon the amount that any one person or group may contribute to a candidate or political committee entails only a marginal restriction upon the contributor's ability to engage in free communication."[11] *Buckley* explained that "[t]he quantity of communication by the contributor does not increase perceptibly with the size of his contribution, since the expression rests solely on the undifferentiated, symbolic act of contributing."[12] Accordingly, *Buckley* held that "the primary First Amendment problem raised by the Act's contribution limitations is their restriction of one aspect of the contributor's freedom of political association."[13]

Perhaps because *Buckley* analyzed contribution limits as minimally impacting speech, *Buckley* implied that contribution limits were subject to something less than

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[11] *Id.* at 20.

[12] *Id.* at 21.

[13] *Id.* at 24.

strict scrutiny, without explicitly defining the level of scrutiny used in sustaining the contribution limits.[14]

In *Buckley,* this Court explained that "[w]hile contributions may **result** in political expression if spent by a candidate or an association to present views to the voters, the transformation of contributions into political debate **involves speech by someone other than the contributor**."[15] *Buckley*, therefore found that:

> A limitation on the amount of money a person may give to a candidate or campaign organization thus involves little direct restraint on his political communication, for it permits the symbolic expression of support evidenced by a contribution but

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[14]*See, e.g., Buckley,* at 25, "governmental 'action which may have the effect of curtailing the freedom to associate is subject to the closest scrutiny'" *id.* at 29, "We find that, under the rigorous standard of review established by our prior decisions, the weighty interests served by restricting the size of financial contributions to political candidates are sufficient to justify the limited effect upon First Amendment freedoms caused by the $1,000 contribution ceiling" and; *id.* at 44-45, "The discussion ..., *supra,* explains why the Act's expenditure limitations impose far greater restraints on the freedom of speech and association than do its contribution limitations. The markedly greater burden on basic freedoms caused by §608(e) (1) [limiting independent expenditures] thus cannot be sustained simply by invoking the interest in maximizing the effectiveness of the less intrusive contribution limitations. Rather, the constitutionality of §608(e) (1) turns on whether the governmental interests advanced in its support satisfy the exacting scrutiny applicable to limitations on core First Amendment rights of political expression."

[15]*Buckley*, 424 U.S. at 21 (emphasis supplied). *Accord, California Medical Association*, 453 U.S. 182, 197 (1981).

**does not in any way infringe the contributor's freedom to discuss candidates and issues.**[16]

In *California Medical Association v. F.E.C.*,[17] a plurality of this Court interpreted *Buckley* to mean that contributions were not "entitled to full First Amendment protection" and described contributions as "speech by proxy."[18] Similarly, this Court, in *F.E.C. v. National Conservative Political Action Committee*, distinguished between the speech by proxy of contributors and the independent expenditures of PACs, finding the latter entitled to full first amendment protection.[19] Accordingly, in *F.E.C. v. Massachusetts Citizens For Life*, this Court stated that it had "consistently held that restrictions on contributions require less compelling justification than restrictions on independent spending."[20]

Despite this Court's square holdings, the Eighth Circuit held "we apply strict scrutiny in this case..."[21] In

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[16]*Buckley*, 424 U.S. at 21 (emphasis supplied).

[17]453 U.S. 182 (1981).

[18]*Id.* at 196.

[19]470 U.S. 480, 494-495 (1985).

[20]479 U.S. 238, 259-260 (1986).

[21]*Carver v. Nixon*, 72 F.3d 633, 638 (8th Cir. 1995).

so holding, the Eighth Circuit created a clear split among the circuits' interpretations of *Buckley*.[22]

The Eighth Circuit acknowledged that *Buckley* articulated a standard less than strict scrutiny applicable to contribution limitations. However, the Eighth Circuit noted that *Buckley* also articulated a "compelling state interest" in upholding contribution limitations. The Eighth Circuit therefore concluded: "When the Court in *Buckley* analyzed the contribution limits, it articulated and applied

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[22]*See, Service Employees International Union v. Fair Political Practices Commission*, 955 F.2d 1312, 1322 (9th Cir. 1992) ("The Supreme Court has applied a somewhat less stringent test than strict scrutiny to decide the constitutionality of contribution limitations. However, the test is still a 'rigorous' one. ... Proposition 73's ban on inter-candidate transfers may be sustained, therefore, only if the state 'demonstrates a sufficiently important interest and employs means closely drawn to avoid unnecessary abridgment of associational freedoms'." *quoting Buckley*, 424 U.S. at 25), (citations omitted). *See also, Let's Help Florida v. McCrary*, 621 F.2d 195 (5th Cir. 1980). In determining the constitutionality of a $1,000 limit on contributions to committees organized to promote or defeat referenda issues, the Fifth Circuit interpreted *Buckley* to mean that "[e]ven though contributions receive less first amendment protection than do direct expenditures, a state may restrict political contributions only if the state 'demonstrates a sufficiently important interest and employs means closely drawn to avoid unnecessary abridgment of associational freedoms.'" *Id.* at 199, *quoting Buckley*, 424 U.S. at 25. The Fifth Circuit implicitly accepted the interest of the state in promoting disclosure of the proposal's financial support as a sufficiently important interest, but found that the statute was not closely drawn to avoid unnecessary abridgment of associational freedoms.

a strict scrutiny standard of review."[23] The Eighth Circuit's explication was:

> In view of these fundamental interests, the Court has instructed that campaign contribution limits are "subject to the closest scrutiny." Under this standard, "a significant interference with protected rights of political association may be sustained" only when the State can demonstrate "a sufficiently important interest and employs means closely drawn to avoid unnecessary abridgement of associational freedoms." ...
>
> The State argues that the Court in *Buckley* applied strict scrutiny only to legislation limiting independent expenditures and applied a lower, intermediate standard of review to contribution limits. ...
>
> We recognize that the Court distinguished restrictions on independent expenditures from restrictions on contributions. Since *Buckley*, members of the Court, in dicta, have indicated that contribution limits should receive a lower level of scrutiny. In contrast, other members of the Court strongly disagree, arguing that nothing less than strict scrutiny should apply to contribution limits. The Court has not ruled that anything other than strict scrutiny

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[23]72 F.3d at 637.

> applies in cases involving contribution limits. When the Court in *Buckley* analyzed the contribution limits, it articulated and applied a strict scrutiny standard of review. ...
>
> Thus, we apply strict scrutiny in this case, and the State must show that the Proposition A limits are narrowly tailored to meet a compelling state interest.[24]

Some federal district courts have agreed with the Eighth Circuit's interpretation of *Buckley*, and have applied the strict scrutiny standard to contribution limitations as well as to expenditure limitations[25]. The First and Ninth Circuits, and some state and other federal

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[24]72 F.3d at 636-638 (citations omitted).

[25]*See, e.g., Vannatta v. Keisling*, 899 F. Supp. 488, 496 (Oregon 1995) (in challenge to contribution limits on out-of-district contributors, court rejected appellants' contention that *Buckley* applied less than strict scrutiny to contribution limits and held that *Buckley* "sustained the contribution limits because they were supported by a compelling state interest in preventing 'improper influence,' but . . . invalidated the expenditure restrictions because they failed to serve any substantial governmental interest."); *Kentucky Right to Life, et al. v. Nicholas King, et al.*, Case No. 3:95CV-582-H, n.9, (W.D.Ky. 1995) (unpublished opinion). *See also, Service Employees International Union v. Fair Political Practices Commission*, 747 F. Supp. 580, 589 n.20 (E.D. Cal. 1990) *aff'd* 955 F.2d 1312 (9th Cir. 1992) (recognizing the distinction but finding that "as best [this court] the 'speech by proxy' notion has never commanded a majority of the Court, and it appears to be inconsistent with the evolving First Amendment doctrine").

courts, however, hold *Buckley* applies less than strict scrutiny to contribution limits.[26]

The Court should grant the writ in this case to eliminate the confusion among the courts whether contribution limitations are subjected to strict scrutiny or "less compelling justification."[27] If this Court were to determine that the Eighth Circuit's application of strict scrutiny was proper, the Court would then need to clarify the confusion surrounding the nature of the compelling state interest necessary to withstand such strict scrutiny.

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[26]*See*, footnote 17, *supra*. *See also*, *Opinion of the Justices to the House of Representatives*, 637 N.E.2d 213 (Mass. 1994). In determining that aggregate limits on the total amount of contributions candidates could accept would be tantamount to restricting the candidates' expenditures, the Supreme Judicial Court held that "[b]ecause [*Buckley*] treated freedom of association as subject to greater abridgment than freedom of speech, [*Buckley*] generally upheld ... contribution limitations ... but it rejected ... expenditure limitations as unconstitutional" and that "the restrictions on freedom of association imposed by contribution limitations are subject to a less strict standard than are the burdens placed on speech by the expenditure limitations." *Id*. at 215-216. In *Zeller v. The Florida Bar*, 909 F. Supp. 1518 (N.D. Fla. 1995), the court recognized a distinction between the level of scrutiny applicable to contribution limits and expenditure limits, but it found the distinction inapplicable in that case because the contribution restriction there, a complete prohibition on contributions to candidates earlier than one year prior to the election, also had the effect of limiting the expenditures of the candidates during that period.

[27]*F.E.C. v. Massachusetts Citizens for Life*, 479 U.S. at 259-60.

## II. This Court Should Reaffirm that the Governmental Interests Sufficient to Warrant Contribution Limits Include Protecting Public Confidence in the Integrity of the Electoral Process.

The Eighth Circuit found that the only compelling interest identified in this Court's decision in *Buckley* is "the prevention of corruption and the appearance of corruption spawned by the real or imagined coercive influence of large financial contributions"[28] The Eighth Circuit therefore found that a State or local government has a compelling interest only in preventing large campaign contributions:

> The district court held that "[u]nder *Buckley*, Missouri clearly has a compelling state interest in limiting campaign contributions." *Carver*, 882 F. Supp. at 904. This does not square with the interest of limiting "large campaign contributions" as defined in *Buckley*. The District court's decision substantially broadens the compelling interest identified in *Buckley*. The district court erred as a matter of law in extending *Buckley* to the infinitely broader interest of limiting all, not just large, campaign contributions.[29]

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[28] *Carver v. Nixon*, 72 F.3d at 638, *quoting Buckley*, 424 U.S. at 25 (emphasis supplied by the Eighth Circuit).

[29] *Id.* at 639.

By focusing on *Buckley*'s observation that large campaign contributions particularly lend themselves the appearance of corruption, the Eighth Circuit misidentified the compelling governmental interest as "limiting large campaign contributions" rather than preventing corruption and its appearance. That holding is clearly contrary to *Buckley*.

In *Citizens Against Rent Control v. City of Berkley*, the Court did say:

> *Buckley* identified a single narrow exception to the rule that limits on political activity were contrary to the First Amendment. The exception relates to the perception of undue influence of large contributors to a candidate[.][30]

However, in *F.E.C. v. National Right to Work Committee*, a unanimous Court held:

> ... in *Buckley v. Valeo* ... we specifically affirmed the importance of preventing both the actual corruption threatened by large financial contributions and the eroding of public confidence in the electoral process through the appearance of corruption. **These interests directly implicate "the integrity of our electoral process, and, not less, the responsibility of the individual citizen for the successful functioning of**

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[30]454 US 290, 296 (1981).

> **that process."** ... [When the legislature has acted] to prevent both actual and apparent corruption, ... we accept Congress' judgment that it is the potential for such influence that demands regulation. Nor will we second-guess a legislative determination as to the need for prophylactic measures where corruption is the evil feared.[31]

Thus, the Eighth Circuit is in error when it narrows the compelling interests to limiting "large" contributions because of their special tendency to create the perception of corruption. The States' and cities' interests in "the integrity of our electoral process" is equally compelling.

## III. The Court Should Furnish Criteria for Determining the Level at Which Contribution Limitations are too Low to be Sufficiently Narrowly Tailored.

Consistent with *Buckley's* holding that contribution limits burden primarily the contributor's right to freely associate, not the contributor's freedom of speech,[32] any

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[31]459 U.S. 197, 208-10 (1982), *quoting United States* v. *Automobile Workers*, 352 U.S. 567, 570 (1957).

[32]*See, e.g., Wachsman v. City of Dallas*, 704 F.2d 160, 173 (5th Cir. 1983) ("Limitations on campaign contributions unquestionably involve substantial first amendment rights. These rights are primarily associational, although they also affect freedom of expression, especially when the ban is absolute. In fact, since a total prohibition prevents the 'symbolic expression of support evidenced by a contribution,' [*Buckley, supra*] the City Charter [which prohibits contributions by city employees to some candidates] limits employees' freedom of expression in the

analysis of *Buckley's* reference to a "difference in kind" must focus on the associational burdens imposed by a particular contribution limitation. According to *Buckley*, the difference in kind would occur only if the limit were so low that "the limitations prevented candidates and political committees from amassing the resources necessary for effective advocacy," or "preclude[d] ... associations from effectively amplifying the voice of their adherents, the original basis for the recognition of First Amendment protection of the freedom of association."[33]

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constitutionally sensitive area of political speech.") (citations omitted); *Federal Election Commission v. Weinsten*, 462 F. Supp. 243, 249 (S.D.N.Y. 1978) (interpreting *Buckley* as saying that Congress may not totally prohibit individual contributions).

[33]Buckley, 424 U.S. at 21, 22. For examples of cases adhering to such an analysis, *see State v. Dodd*, 561 So.2d 263, 266, (Fla. 1990) (in holding unconstitutional a ban on contributions while the legislature was in session, the court stated that while "*Buckley* found a less significant free speech interest when contributions were subject to a ceiling, because the 'quantity of communication ... does not increase perceptibly with the size of [the] contribution' ... the *Buckley* Court expressly distinguished its own factual situation from restrictions on contributions that effectively would prevent candidates 'from amassing the resources necessary for effective advocacy.'") (citation omitted); *Opinion of the Justices to the House of Representatives*, 637 N.E.2d 213 (Mass. 1994) (invalidating aggregate contribution limits because limits on the total amount of contributions candidates could accept was tantamount to restricting the candidates' expenditures); *Zeller v. The Florida Bar*, 909 F. Supp. 1518 (N.D. Fla. 1995) (holding a complete prohibition on contributions to candidates earlier than one year prior to the election unconstitutional because the restriction also had the effect of limiting the expenditures of the candidates during that period); *see also, Service Employees International Union v. Fair Political Practices Commission*, 955 F.2d 1312, 1322 (9th Cir. 1992) (finding unconstitutional a ban on a candidate's use of his campaign funds to contribute to other candidates because it operated as an expenditure limitation).

The Eighth Circuit completely failed to undertake this inquiry. Indeed, the Eighth Circuit invalidated Missouri's effort to calibrate its limitations to the size of the affected constituencies. Instead, the result reached by the Eighth Circuit makes the $1,000 approved in *Buckley* a benchmark which, when discounted for 22 years' inflation, forms a floor under which State and local governments cannot go. Nothing in *Buckley* supports that analysis.

The Eighth Circuit's simple mathematical comparison with the contribution limit upheld in *Buckley* is a flawed analysis. It ignores the relative size of constituencies in nationwide Presidential elections, as in *Buckley*, and in the statewide and local elections in this case.[34] The Eighth Circuit's approach further ignores the inherently smaller sum of aggregate contributions amassed in elections for less significant offices than the Presidency of the United States, the election at issue in *Buckley*.[35]

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[34]As the United States District Court for the Western District of Kentucky recently stated in upholding Kentucky's $500 contribution limit: "Comparing this limitation to the $1,000 limitation approved in *Buckley*, as some courts have attempted, is unenlightening for a whole host of reasons. Among other things, the difference in the scope of the elections is so immense that comparisons are meaningless. Additionally, the *Buckley* Court did not propose $1,000 as the lower limit, only as an amount which passed constitutional muster." *Kentucky Right to Life, et al. v. Nicholas King, et al.*, Case No. 3:95CV-582-H, n.9 (W.D.Ky. 1995) (unpublished opinion), appeal pending, No. 95-6581 (6th Cir.).

[35]Even if a mathematical comparison would suffice to determine when contribution limits are "too low," the comparison of anticipated expenditures in state and local elections, in comparison to *Buckley's* national elections, is a more accurate measure of the narrow tailoring of those contribution limits than the flat-rate, inflation-indexed comparison offered by the Eighth Circuit. For example, in Kentucky gubernatorial

Moreover, the Eighth Circuit's rationale ignores the ability of local legislators and voters to accurately gauge the level at which contributions might be perceived in their community as having the potential to corrupt candidates.

Finally, the Eighth Circuit opinion imposes the burden upon the State or local government to prove why it selected a particular contribution limit lower than other available alternatives. 72 F.3d at 642-43.[36] That holding is contrary to the teachings of this Court. In *Buckley*, this Court squarely held that "[i]f it is satisfied that some limit on contributions is necessary, a court has no scalpel to probe, whether, say, a $2,000 ceiling might not serve a well as $1,000." 424 U.S. at 30. Similarly, in *F.E.C. v. National Right to Work Committee*, this Court said that it

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elections, there is a voluntary $1.8 million expenditure limitation for publicly funded slates of candidates and a $500 limit on the amount an individual can contribute to each slate. The statutes approved in *Buckley* involved a $1,000 contribution limit in national campaigns limited to $20 million in expenditures. *See*, 424 U.S. at 54. Thus, *Buckley* approved limiting contributions by individuals to 1/20,000 of the total expenditures in a national campaign, and Kentucky limits contributions to 1/3600 of the aggregate expenditures in a statewide campaign. Thus, the Kentucky $500 limit is more than 500% larger than the $1,000 limit approved in *Buckley* when expressed as a percentage of the candidate's anticipated expenditures.

[36]The Eighth Circuit acknowledged the teaching of *Buckley* that "we certainly are not free to fine tune the limits established by Proposition A, and we generally accept the limits established by the legislature...." 72 F.3d at 641. The Eighth Circuit nevertheless held: "The State produced no evidence as to why the Proposition A limits of $100, $200, and $300 were selected. ... The record is barren of any evidence of a harm or disease that needed to be addressed between the limits of Senate Bill 650 and those enacted in Proposition A." *Id.* at 642-43.

would not "second-guess a legislative determination as to the need for prophylactic measures where corruption is the evil feared."[37] By deviating from these precepts, the Eighth Circuit has created confusion concerning the criteria by which state and federal courts are to judge contribution limitations less than the $1,000 expressly approved in *Buckley*.

## CONCLUSION

In sum, the Eighth Circuit's decision will inhibit the campaign finance reform movement by confusing state and local legislators and by encouraging litigation employing the Eighth Circuit's erroneous and ambiguous standards. By holding that only those limits which prohibit "large" contributions pass constitutional muster, the Eighth Circuit has obscured the proper criteria for determining whether any particular contribution limit is sufficiently narrowly tailored to survive the proper level of scrutiny.

There clearly is confusion among the lower courts, including an outright split in circuits concerning the level of scrutiny applicable to contribution limitations. The Eighth Circuit's opinion, if left unaddressed by this Court, will add much to that confusion, inhibiting the ability of the State and local governments to restore public confidence in the electoral process. The Court should not

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[37]459 U.S. at 210.

wait for the confusion to worsen before granting certiorari on these issues, which go to the core of self-government.[38]

Respectfully submitted,

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[38]The Court has already granted certiorari this Term in a campaign finance regulation case: *Colorado Republican Federal Campaign Committee v. F.E.C.*, No. 95-489. A significant issue in that case is Petitioners' contention the limitations imposed by 2 U.S.C. § 441a(d) are unconstitutionally low. Brief for Petitioners, at 27-28.

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# APPENDIX A

## STATES AND CITIES WITH CONTRIBUTION LIMITS BELOW $1,000 PER ELECTION/$2,000 PER ELECTION CYCLE[1]

| STATE / CITY NAME | CONTRIBUTION LIMIT |
|---|---|
| **Arizona:** | |
| Statewide | $690 |
| Other Offices | $270 |
| **Connecticut:** | |
| Probate Judge<br>State Senate | $500 |
| State Representative<br>Other Local Offices | $250 |
| **Delaware:** | |
| Non-Statewide Candidate | $600 |
| **District of Columbia:** | |
| Mayor<br>Council Chair<br>Councilmember At-Large | $100 |
| Councilmember From a District or Board of Education Member At-Large | $50 |
| Board of Education Member From a District or Party Official Neighborhood Advisory Committee Member | $25 |

[1]Unless otherwise noted, contribution limits are per election.

| STATE / CITY NAME | CONTRIBUTION LIMIT |
|---|---|
| **Florida:** | |
| All Offices | $500 |
| **Kansas:** | |
| State House | $500 |
| Local Office | |
| District Judge | |
| District Magistrate Judge | |
| District Attorney | |
| State School Board | |
| **Kentucky:** | |
| School Board | $100 |
| All Other Candidates | $500 |
| **Massachusetts:** | |
| All Candidates | $500[a] |
| **Michigan:** | |
| State Representative | $500[b] |
| Judicial Office | $100[bc] |
| **Minnesota:** | |
| Governor / Lt. Governor | $500[d] |
| Attorney General | $200[d] |
| Other Statewide Offices | $500[e] \ $100[d] |
| State Senate | |
| State Representative | |

[a]Per Year
[b]Per Election Cycle
[c]Lawyers
[d]Non-Election Year
[e]Election Year

| STATE / CITY NAME | CONTRIBUTION LIMIT |
|---|---|
| **Missouri**: | |
| Senate Candidates | $500 |
| House Candidates | $250 |
| Local Office Candidates | Various Limits |
| **Montana**: | |
| Governor / Lt. Governor | $400 |
| Statewide Candidates | $200 |
| All Other Candidates | $100 |
| **Oregon**: | |
| Governor<br>Secretary of State<br>State Treasurer<br>Superintendent of Public Instruction<br>Attorney General<br>Commissioner of the Bureau of Labor and Industries<br>Judge of Supreme Court or Court of Appeals or Tax Court | $500 |
| State Senator<br>State Representative | $100 |
| **The City of San Diego, California**: | |
| All Candidates | $250 |
| **Springfield, Missouri**: | |
| All Candidates | $75 / $150[b] |
| **South Dakota**: | |
| Legislative<br>County Office | $250[f] |
| **Washington**: | |
| State Legislative Office | $500 |

[b]Per Election Cycle
[f]Per Calender Year

| STATE / CITY NAME | CONTRIBUTION LIMIT |
|---|---|
| **Wisconsin:** | |
| State Assembly Representative | $500[f] |
| Local Office | $250 x 1 cent x number of inhabitants ($3,000 maximum) |

[f]Per Calendar Year

# APPENDIX B

## STATES WITH CONTRIBUTION LIMITS AT $1,000 PER ELECTION/$2,000 PER ELECTION CYCLE

| STATE NAME | CONTRIBUTION LIMIT |
|---|---|
| **Alaska:**<br>All Offices | $1,000[a] |
| **Arkansas:**<br>All Offices | $1,000 |
| **California:**<br>All Offices | $1,000[g] |
| **Connecticut:**<br>Sheriff<br>Local Chief Executive | $1,000 |
| **Georgia:**<br>Statewide<br>General Assembly<br>Other Candidates | $1,000[d] |
| **Hawaii:**<br>2-Year Offices | $2,000[b] |
| **Kansas:**<br>State Senate | $1,000 |
| **Louisiana:**<br>All Candidates except Major Office and District Office Candidates | $1,000 |

[a]Per Year
[g]Per Special Election or Special Runoff Election
[d]Non-Election Year
[b]Per Election Cycle

| STATE NAME | CONTRIBUTION LIMIT |
|---|---|
| **Maine:** | |
| All Offices | $1,000 |
| **Michigan:** | |
| State Senate | $1,000[b] |
| **Minnesota:** | |
| Gov./Lt. Governor | $2,000[e] |
| Attorney General | $1,000[e] |
| **Missouri:** | |
| Statewide Offices | $1,000 |
| **Nevada:** | |
| State | $2,000[b] |
| City | |
| County | |
| Judicial | |
| **New Hampshire:** | |
| All Candidates (unless the candidate agrees to voluntarily limit expenditures) | $1,000 |
| **New York:** | |
| Candidates other than Statewide Candidates, State Senator, Member of General Assembly, New York City Mayor, Public Advocate and Comptroller | $1,000 |
| **Oklahoma:** | |
| Local Candidate | $1,000[f] |
| **Rhode Island:** | |
| All Candidates Except Publicly Funded Candidates | $1,000[f] |

[b]Per Election Cycle
[e]Election Year
[f]Per Calendar Year

| STATE NAME | CONTRIBUTION LIMIT |
|---|---|
| **South Carolina:**<br>Per Non-Statewide Candidate | $1,000 |
| **South Dakota:**<br>Statewide Office | $1,000[f] |
| **Tennessee:**<br>Non-State Office Candidate | $1,000 |
| **Vermont:**<br>All Offices | $1,000 |
| **Washington:**<br>State Executive Office | $1,000 |
| **West Virginia:**<br>Per Candidate | $1,000 |
| **Wisconsin:**<br>State Senator<br>Circuit Judge | $1,000[f]<br>1,000 or $3,000[h] |
| **Wyoming:**<br>Per Candidate | $1,000[i] |

[f]Per Calendar Year
[h]Depending on Population of Circuit
[i]Per Primary, General or Special Election

# APPENDIX C

## STATES WITH CONTRIBUTION LIMITS SLIGHTLY OVER $1,000 PER ELECTION/$2,000 PER ELECTION CYCLE

| STATE NAME | CONTRIBUTION LIMIT |
|---|---|
| Connecticut: | |
| Statewide Executive Offices (Excluding Governor) | $1,500 |
| Delaware: | |
| Statewide Candidate | $1,200 |
| New Jersey: | |
| Governor | $1,800 |
| Non-Governor | $1,500 |

# APPENDIX D

## CONTRIBUTION LIMITS FOR OTHER STATES

| STATE NAME | CONTRIBUTION LIMIT |
|---|---|
| **Alabama:** | |
| All Offices | Unlimited |
| **Arizona:** | |
| Total Contributions | $2,560[f] |
| **Colorado:** | |
| All Offices | Unlimited |
| **Connecticut:** | |
| Governor | $2,500 |
| **Georgia:** | |
| Statewide Candidates | $5,000[e] |
| General Assembly | $2,000 |
| Other Candidates | |
| **Hawaii:** | |
| 4-Year Offices | $4,000[b] |
| Statewide Offices | $6,000[b] |
| **Idaho:** | |
| All Offices | Unlimited |
| **Illinois:** | |
| All Offices | Unlimited; but generally prohibited for judicial candidates and judicial employees |

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[f]Per Calendar Year
[e]Election Year
[b]Per Election Cycle

| STATE NAME | CONTRIBUTION LIMIT |
|---|---|
| **Indiana:** | |
| All Offices | Unlimited |
| **Iowa:** | |
| All Offices | Unlimited |
| **Kansas:** | |
| Statewide Candidate | $2,000 |
| **Louisiana:** | |
| Major Office Candidates | $5,000 |
| District Office Candidates | $2,500 |
| **Maryland:** | |
| Per Candidate | $4,000[b] |
| Per Four-Year Election Cycle | $10,000 |
| **Michigan:** | |
| Statewide Office | $3,400[b] |
| **Mississippi:** | |
| All Offices | Unlimited |
| **Nebraska:** | |
| All Offices | Unlimited |
| **Nevada:** | |
| Statewide Office | $10,000[b] |
| **New Hampshire:** | |
| Per Candidate (if the candidate agrees to voluntarily limit expenditures) | $5,000 |
| **New Mexico:** | |
| All Offices | Unlimited |
| **North Carolina:** | |
| All Candidates | $4,000 |

[b]Per Election Cycle

| STATE NAME | CONTRIBUTION LIMIT |
|---|---|
| **North Dakota:**<br>All Offices | Unlimited |
| **Ohio:**<br>All Offices | Unlimited |
| **Oklahoma:**<br>Candidate/Candidate Committee for State or Municipal Office in a Municipality of 250,000 or more | $5,000[f] |
| **Pennsylvania:**<br>All Offices | Unlimited |
| **Rhode Island:**<br>All Candidates | $10,000[f] |
| **South Carolina:**<br>Statewide Candidate | $3,500 |
| **Tennessee:**<br>State Office Candidates | $2,500 |
| **Texas:**<br>All Offices | Unlimited |
| **Utah:**<br>All Offices | Unlimited |
| **Virginia:**<br>All Offices | Unlimited |
| **Washington:**<br>For a Campaign For Other Than Statewide Offices | $5,000[j] |

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[f]Per Calendar Year
[j]Within 21 Days of General Election

| STATE NAME– | CONTRIBUTION LIMIT |
|---|---|
| **Wisconsin:** | |
| Statewide Office | $10,000[f] |
| Court of Appeals Judge | $2,500 or $3,000[k] |

[f]Per Calendar Year
[k]Depending on Population of District

Supreme Court, U.S.
FILED
MAR 12 1996
CLERK

No. 95-1258

# IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

Jeremiah W. (Jay) Nixon, Attorney General of Missouri, and John Maupin, Chairman, Missouri Ethics Commission, *Petitioners*,

v.

Thomas D. Carver, *Respondent*.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

## PETITIONERS' REPLY BRIEF

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

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JEREMIAH W. (JAY) NIXON,
Attorney General of Missouri,
and JOHN MAUPIN, Chairman, Missouri Ethics Commission, *Petitioners*,

v.

THOMAS D. CARVER, *Respondent*.

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# PETITIONERS' REPLY BRIEF

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## REPLY TO RESPONDENT'S REASONS WHY THE WRIT SHOULD NOT BE GRANTED

Respondent offers two reason for denying the petition: that the record is inadequate to decide the compelling state interest issue he assumes applies, and that the number of judicial challenges to campaign contribution limits is not sufficient to justify this Court's attention. The first argument is misguided because it assumes the answer to a core legal question presented: what is the proper standard of judicial review of limits on campaign contributions? Respondent does not even discuss *California Medical Ass'n v. FEC*, 453 U.S. 182 (1981), which at a minimum indicates that heightened scrutiny is not appropriate for examining the constitutionality of contribution limits.

The second argument completely ignores petitioners' argument on this point, which is that the decision below directly interferes with the widespread and growing grassroots movement attempting to lower limits on campaign contributions. Because of these political developments, which are being distorted by the court of appeals' constitutional ruling, the Court should intervene sooner rather than later to ensure that the political debate is focused on issues of policy and not distracted by constitutional concerns.

In sum, respondent has not remotely justified postponing resolution of the fundamental questions concerning the constitutional standard for judging limits on campaign contributions. Accordingly, the Court should grant the petition and eliminate the confusion concerning how *Buckley v. Valeo*, 424 U.S. 1 (1976), applies to lower contribution limits.

1. Respondent's primary argument is that the record in this case is inadequate to permit the Court to evaluate whether Proposition A is narrowly tailored to achieve the concededly (Opp. 7) compelling state interest of eliminating the perception of corruption created by handing hundreds of dollars to candidates to use as they wish. But, if the appropriate standard of review is a rational relationship standard, which is a question presented, then the record plainly is adequate to justify the limits in Proposition A. On the legal issue of the proper standard of review, respondent is utterly silent, preferring to assume that he is correct.

Although the Court has not definitively resolved the issue, it certainly has indicated that the court of appeals and the respondent are incorrect in their assumption that Missouri must advance a compelling state interest for its

contribution limits. What this Court has recognized is that contribution limits involve nothing more than "a marginal restriction upon a contributor's ability to engage in free communication." *Buckley*, 424 U.S. at 20, 21. To be sure, the *act* of contributing was held to be protected by the First Amendment, because by contributing the payor provides "a general expression of support for the candidate and his views." *Id.* at 21. But merely by contributing the payor does not "communicate the underlying basis for the support." *Id.* Accordingly, this Court recognized in *Buckley* that "[t]he quantity of communication by the contributor does not increase perceptibly with the size of his contribution, since the expression rests solely on the undifferentiated, symbolic act of contributing." *Id.* This logic suggests that an absolute ban on contributions might trigger heightened scrutiny, but that a state law restriction that protects the contributors' right to make symbolic expressions of support for particular candidates, while allowing the contributors to spend whatever they wish (either alone or in groups) to speak on the issues or in support of the candidates, will be treated more deferentially under the Constitution.

The argument against heightened scrutiny is made even stronger by the fact that the legislative history of the Federal Election Campaign Act Amendments at issue in *Buckley* did not contain any evidence that anyone had purchased from any public officer, through something near a $1,000 contribution, a single legislative vote, government contract, judicial decision, or any other benefit. This Court affirmed the selection of the $1,000 ceiling without requiring any such evidence. That affirmance is not

consistent with respondent's insistence that strict scrutiny is required.[1]

The argument in favor of rational basis review is reinforced by the plurality's analysis of the constitutional standards in *California Medical Ass'n*, upon which petitioners relied heavily in the petition (Pet. 22-24). There, the plurality indicated that reasonableness was the proper standard to apply to contribution limits. 453 U.S. at 199, 200 n. 20 (Marshall, J.). Moreover, that was plainly the holding of the Ninth Circuit in that case. 641 F.2d at 624. Respondent does not even suggest a reason why the Court should not resolve this lack of clarity concerning the proper legal standard. As the decision below reveals, the legal question is vital to whether campaign limits more restrictive than those approved in *Buckley* are constitutional. Accordingly, the Court should decide the issue.

2. Respondent's alternative argument for denying the petition is that there have been too few judicial opinions on this issue to warrant the Court's attention at this point. But petitioners acknowledged as much in the petition. As discussed there (Pet. 11-14), the 1990's have ushered in a new era of campaign finance reform, one in which the voters, through initiative petitions, are taking into their own

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[1] Of course, if respondent and the Eighth Circuit are correct that some kind of additional record is now required to uphold limits on campaign contributions, then the Court needs to make that point clear sooner rather than later. Most state initiatives will not come wrapped with particularized findings because the Court has never insisted upon them before. Thus, rather than serve as a basis for denying the petition, respondent's obsession with a more formal record provides an additional reason why the Court should decide this issue now.

hands the responsibility to define the level at which they perceive corruption in the political system. Moreover, voters are the best judges of what level of limits will eliminate their perception that the system is being corrupted through contributions made directly to candidates. Nothing in the respondent's brief suggests that this case is any different from *Romer v. Evans*, 882 P.2d 1335 (Colo. 1994), *cert. granted*, 115 S.Ct. 1094 (February 21, 1995) (No. 94-1039), and *U.S. Term Limits, Inc. v. Thornton*, 115 S.Ct. 1842 (1995). In each instance, this Court recognized a grassroots political movement that was determined to use the initiative process to obtain legal change that the people were unable to acquire through the legislatures. In each instance this Court saw fit to address the significant legal question without waiting for a conflict among the circuits, and thus to remove the constitutional cloud over the political debate that the lower courts cast. The same need exists here.

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Rather than recognizing the movement in the 1990's toward lower limits on contributions to candidates, respondent myopically focuses on the absence of litigation during the first 20 years after *Buckley*. Rather than acknowledging that a large majority of Missouri voters have said that for them the perception of corruption in state and local office arises at a point well below the limits sustained in *Buckley*, respondent asks the Court to wait until a case arises in which a legislative body has evidence of its own actual corruption before returning to the critical constitutional question addressed, but not yet fully answered by this Court. And, rather than attempting to find in prior precedents of this and other courts even a reasonably certain definition of the proper level of scrutiny to be applied to this "marginal restriction upon a contributor's

ability to engage in free communication" (424 U.S. at 20-21), respondent chooses to assume that he is correct that strict scrutiny applies. What respondent cannot deny is that this case raises head on, for the first time since *Buckley*, the increasingly important question of how far state legislatures, city councils, the people by initiative, and even Congress can go when they use the tool of contribution limits as a means of attacking the perception of political corruption. That question deserves this Court's immediate attention.

Respectfully submitted,

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